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No. 10136

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol 2341

— say Vol 2340
for Vol 1

J. HOWARD EDGERTON and CLIFFORD W.
TWOMBLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Three Volumes
VOLUME II
Pages 473 to 898

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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**Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division**

(Testimony of Myron W. Reed.)

The Court: I think the objection is sound. Of course I can't tell how important it is, but I think if you have the trust deed, or it is in evidence, maybe you can short-cut by getting a stipulation. But the objection is sound technically.

Mr. Campbell: Yes. [325]

I do not have the trust deed or the note here. The matter is, however, evident in the books and records here in evidence.

The Court: Well, possibly one of these men could show the record to the defendants' counsel so that they might be satisfied with it."

The witness further testified: That on or about the month of March, 1934, I had occasion to enter into an escrow at the Title Guarantee and Trust Company, relative to a note secured by a trust deed on certain property owned by our Company.

"Q. You have produced here a copy of a deed of trust which was entered into on the first day of January, 1933, between Reed Bros., Tapley, Geiger & Company, formerly Reed Bros. Company, herein called trustor, J. L. Smale and J. L. McSwiggen, of Los Angeles, called trustee, and the Railway Mutual Building and Loan Association, as corporation, called beneficiary.

Now, is this the deed of trust to which you referred in stating that you received a reconveyance in that escrow? A. Yes, sir."

Q. And did this deed of trust, together with

(Testimony of Myron W. Reed.)

a note as set forth in this deed of trust, represent your obligation as of March, 1934, taking into consideration, however, any reductions of such note by way of payments made in the meanwhile? A. Yes, sir."

(Thereupon said document was offered and received in evidence, subject to the same objection, same ruling and exception. Said document was marked plaintiff's Exhibit 108, and separately certified pursuant to stipulation and order of Court.)

[326]

The witness further testified: In the course of the escrow, we received from the Title Company plaintiff's Exhibit 109 for identification, a reconveyance of the property as set forth in the Deed of Trust.

(Said document was offered and received in evidence subject to the same objection, same ruling and exception as plaintiff's Exhibit 108, and marked plaintiff's Exhibit 109. Said document was separately certified pursuant to stipulation and order of Court.)

The witness further testified: At the time we entered into this escrow there was owing at that time around \$44,000.00. Plaintiff's Exhibit 99 is an escrow instruction signed by me and filed with the Title Guarantee and Trust Company; Plaintiff's Exhibit 101 bears my signature and is also escrow instructions filed by my Company in connection with the escrow with the Title Guarantee and Trust Company.

(Testimony of Myron W. Reed.)

"Q. Now, Mr. Reed, what was the amount paid or caused to be paid by you for the reconveyance of such deed of trust and the satisfaction of the note?

Mr. Irwin: Pardon me, your Honor. I object to that, may it please the Court, as not the best evidence. I assume counsel is directing the question as to it having been paid upon the First Security. That is why I am pressing the objection.

Mr. Campbell: I will amend the question.

Q. What was the amount paid, or caused to be paid by you into the escrow for the reconveyance of that?

Mr. Irwin: No objection to that, so long as we have our running objection.

The Witness: 22,000, or about that amount."

The witness further testified: In addition to that we [327] paid small sums of money for expenses in connection with that escrow. I would think the sums of \$35.00 and \$155.00 would be approximately the amounts so paid. We did not pay at any time to any one either in or out of that escrow any further amounts; nor for the reconveyance of that property and the satisfaction of the note which it secured. We received from the escrow the reconveyance and the cancelled note. Prior to entering into this escrow, I had a conversation with Mr. Howard Edgerton; that being so long ago I couldn't tell you when it took place, nor where it

(Testimony of Myron W. Reed.)

was. Prior to this arrangement with this Discount Company we had arrangements with another man by the name of Kenner. As near as I can get it, I had this other proposition and it fell through, and Mr. Edgerton said he thought he could arrange to do the same thing as this other Company; that is about the gist of the conversation. I don't remember of anything being said at that time about the opening of an escrow.

"Q. Mr. Reed, the deed of trust, which you have produced here, is dated January 1, 1933; the reconveyance which you have produced here, which you have testified came to you out of the escrow, is dated March 15, 1934. Now, when was it with reference to either of those dates that you had this conversation with Mr. Edgerton?

A. Well, that is a tough one. I can't remember when it was. Really, I can't, but, of course, it was prior to either one of those, that I had the talk with him.

Q. It was before you borrowed the money from the Railway Mutual Building and Loan Association?

A. Oh, no. It wasn't before that. It couldn't be."

Q. Now, when was it with relation to those two dates that you had this conversation with Mr. Edgerton?

A. I couldn't tell you. [328]

(Testimony of Myron W. Reed.)

Q. Was it before or after you had borrowed the money as evidenced by this deed of trust?

A. Well, I had made arrangements for that money before the transaction had taken place, of course.

Q. : I am referring to this conversation you had with Mr. Edgerton relative to your paying this trust deed off. Was that before or after you entered into the trust deed ?

A. It was before I entered into it.

Q. Before you entered into this trust deed with the Railway Mutual ?

A. That is to pay off the mortgage you mean ? Is that it ?

Q. No ; I am referring to the conversation where you stated Mr. Edgerton told you that arrangements could be made to take care of your loan. A. That is right.

Q. By going into this escrow ? A. Yes.

Q. Now, when was that conversation had ? Do I understand you now that it was before or after you had originally borrowed the money ? I am referring to borrowing the money from the Railway Mutual Building and Loan Association.

A. I don't know how to answer it. I had the arrangements all made but I had to have that before I could talk to him about it or before I could go on into escrow, I had to have arrangements made for this money.

(Testimony of Myron W. Reed.)

Q. Yes. Well, were those arrangements made just prior to the time you went into escrow?

A. Yes. I had had arrangements made for that a long time before that.

Q. Do you know how long before you went into escrow?

A. Now, wait a minute. If you would just let me [329] look in my papers. I can tell you about that.

Q. All right.

A. I just gathered up a lot of papers here.

Q. In that connection, let me ask you——

A. Now, here is the agreement with R.F.D. Discount, and it was prior to that.

Q. The witness has produced a document headed, 'Agreement,' dated the 16th of February, 1934. A. That is right.

Q. Now when was it with reference to this document that the conversation was had?

A. Well, it was quite a while before this, of course, before.

Q. Yes. By 'quite a while,' do you mean a period of months, days, weeks, years?

A. I would say it was probably two or three months before this took place.

Q. Do you have the original of this agreement which you have produced?

A. Well, let's see if I have it. I brought with me everything I could find.

Q. Yes.

A. Pertaining to this case, and I have got it

(Testimony of Myron W. Reed.)

right in here. This was the contract that I had with—

Q. No; I am referring to this agreement purporting to be between yourself and the R. F. D.

A. If it isn't in here—I have all the papers that we have right here. If it is not in here, we haven't got it."

The witness further testified: This looks to me like this is a copy of it; the original was signed by me as President [330] of our Company; my best recollection is that Mr. H. B. Colwell as President and Mr. M. E. Dickman, as Secretary of the R. F. D. Discount Company signed the Agreement entered into on the 16th day of February, 1934. My best recollection is that the original, or a duplicate original was delivered to the R. F. D. Discount Company.

"Mr. Campbell: I will offer this as plaintiff's Exhibit next in order in evidence.

The Court: It may be received subject to the same objection as to all defendants as to the same ruling as to materiality, as to hearsay and as to being connected up."

(Thereupon said document was received in evidence, marked plaintiff's Exhibit 110, which said document is separately certified pursuant to stipulation and order of Court.)

"Mr. Campbell: At this time I wish to extract this from the file and offer as plaintiff's Exhibit 111, receipt dated March 10, 1934; it purports to be a receipt in re loan No. 129, Reed

(Testimony of Myron W. Reed.)

Bros., Tapley & Geiger, and signed J. Howard Edgerton.

The Court: Same objection as to all defendants; same ruling."

(Said document was received in evidence and marked plaintiff's Exhibit No. 111, which said exhibit is separately certified pursuant to stipulation and order of Court.) [331]

"Mr. Campbell: At this time, if your Honor please, I wish to read certain exhibits to the jury.

First reading from plaintiff's Exhibit 17.

This is the order of the State Building and Loan Commissioner for the segregation of assets, and reading from Exhibit H, which assets were assigned to the First Security Deposit Corporation, which Exhibit H consists of first deeds of trust to be transferred to the First Security Deposit Corporation, December 28, 1933.

Item 129, Reed Bros., Tapley, Geiger and Company. Following this is a legal description of the property. Loan balance, 2-13-34, \$43,-983.38.

I also refer to plaintiff's Exhibit 108, which is a deed of trust dated January 1, 1933, between Reed Bros., Tapley, Geiger and Company, formerly Reed Bros. Company, a California corporation, herein called trustor, J. L. Smale and J. L. McSwiggen, of Los Angeles, California, hereinafter called trustee, and the Railway Mutual Building and Loan Association,

(Testimony of Myron W. Reed.)

a corporation, herein called beneficiary.—I will not read the entire document.

Such deed of trust is dated, for the purposes of securing a promissory note—it is evidenced by a promissory note, said note being Registry No. 129 of even date, executed by trustor to beneficiary for \$45,852.01, which trust deed was executed by Reed Bros., Tapley, Geiger and Company, formerly Reed Bros. Company, a California corporation, by Myron W. Reed, president, by John W. Tapley, secretary.

Reading now from plaintiff's Exhibit 73, which are the minutes of the Special Meeting of the Executive Committee of the First Security Deposit Corporation, March 12, 1934:

'Present: Messrs. R. W. Starr

E. C. Thomas [332]

J. Howard Edgerton

J. L. Smale

C. E. Perkins

C. E. Berry

A. L. Johnson

Miss Florence A. Long

Absent: Mr. W. Seward Brayton.'

Reading a portion of such minutes appearing on the third page thereof:

'On motion duly made, seconded, and carried, the following resolution was adopted:

Whereas, The Reed Bros. Loan #129 has been in default on the books of the First

(Testimony of Myron W. Reed.)

Security Deposit Corporation for approximately eight months, and whereby a cash offer has been made to the Realty Deposit Co. in the amount of \$17,800. which will enable the loan to be removed from the company at a cash profit to the Realty Deposit Co. and with a substantial bond profit to the First Security Deposit Corp. and it appearing to the best interests of the corporation that this loan be sold,

Now, Therefore, the Secretary is hereby authorized to continue negotiations and carry out all necessary procedure for the purpose of disposing of the Reed Bros. loan for \$17,800, cash consideration, provided, however, that this amount of cash so received shall be used first for the purpose of repaying all bonds that have been borrowed for purpose of consummation of the escrow and the balance transferred to profit account of the Realty Deposit Co.' [333]

The minutes are signed 'R. W. Starr, Chairman, C. E. Perkins, Secretary.'

Reading now from plaintiff's Exhibit 18, the minutes of March 21, 1934, being the minutes of the board of directors of the First Security Deposit Corporation:

(Testimony of Myron W. Reed.)

'The following directors were present:

Messrs. R. W. Starr
E. C. Thomas
C. E. Berry
C. E. Perkins
A. R. Ireland
Wm. Leffert
W. S. Brayton.

In addition to the directors, the following were present:

Messrs. J. Howard Edgerton
J. L. Smale
Miss Florence A. Long

The Secretary read the minutes of January 17 and February 21, and special meetings of January 10, February 21, and 28, 1934, which were approved as read.

The Secretary also read the minutes of Executive Committee meetings of January 12, 17, 18, 23, 24, 29, 31, February 2, 5, 6, 7, 13, 19, 26, March 3, 5, 6, 12, and 19, 1934, all of which were ratified.'

The minutes bear the signature of Dr. R. W. Starr, Chairman, and C. E. Perkins, Secretary.

Reading now from plaintiff's Exhibit 21, the minutes of the Board of Control of the Realty Deposit Company for March 12, 1934: [334]

'The meeting was called to order at 12:30 P.M. by Dr. R. W. Starr, Chairman.

All members of the Board of Control were

(Testimony of Myron W. Reed.)

present, and in addition thereto the following persons were present:

Mr. J. L. Smale

Mr. C. E. Berry

Mr. C. E. Perkins

Mr. A. I. Ireland

Mr. A. L. Johnson

Miss Florence Long.'

I will not at this time refer to the stipulation as to the members of the Board of Control at that time, that having heretofore been read.

'On motion duly made, seconded and carried, the following Resolution was adopted:

Whereas, the Reed Bros. Loan #129 has been in default on the books of the First Security Deposit Corporation for approximately eight months, and whereby a cash offer has been made to the Realty Deposit Co. in the amount of \$17,800.00 which will enable the loan to be removed from the Company at a cash profit to the Realty Deposit Co. and with a substantial bond profit to the First Security Deposit Corporation and it appearing to the best interests of the Corporation that this loan be sold

Now, Therefore, the Secretary is hereby authorized to continue negotiations and carry out all necessary procedure for the purpose of disposing of the Reed Bros loan for \$17,800.00 cash consideration provided, however, that this [335] amount of cash so

(Testimony of Myron W. Reed.)

received shall be used first for the purpose of repaying all bonds that have been borrowed for the purpose of consummation of the escrow and the balance transferred to profit account of the Realty Deposit Co.'

The minutes are signed 'Dr. R. W. Starr,
Chairman, J. Howard Edgerton, Secretary.'

I will next read plaintiff's Exhibit 110:

'AGREEMENT

WHEREAS, the undersigned, Reed Brothers Co., a corporation, is the owner of the following described real property, to-wit:

The S.E. 14 feet of Lot 6, Subdivision of Lot 4, Block 6, Bell's Addition, as per Map recorded in Book 2, p. 626, Miscellaneous Records of Los Angeles County; the S.E. 65 feet of N.W. 111 feet of Lot 2, Block 6, a portion of Bell's Addition, and the N.W. 46 feet of Lot 2, Block 6, a portion of Bell's Addition, as per Map recorded in Book 32, p. 39, Miscellaneous Records of said County; said property being subject to a deed of trust held by the First Security Deposit Corporation, a corporation, upon which there is an unpaid balance of approximately \$44,000.00; and

Whereas, the undersigned, R.F.D. Discount Company, a corporation, is the owner of certain bonds of the First Security De-

(Testimony of Myron W. Reed.)

posit Corporation, and in a position to exchange said bonds for a reconveyance of said deed of trust,—

Now, therefore, it is mutually covenanted and agreed, that in consideration of the sum of Twenty-Two Thousand Dollars (\$22,000.00), said sum [336] to be deposited by said Reed Brothers Co. in escrow, under appropriate escrow instructions, with Title Guarantee & Trust Company, the undersigned R.F.D. Discount Company does hereby agree to deposit in said escrow for the use of said Reed Brothers Co. a reconveyance of said deed of trust.

It is Further Agreed, that when an appropriate reconveyance of the deed of trust has been deposited in escrow to the credit of the Reed Brothers Co., the disposition of said \$22,000.00 shall be disbursed by the R.F.D. Discount Company in any manner it may see fit. The written instructions of C. W. Twombly shall be sufficient authority for the escrow holder to disburse said funds on behalf of the R.F.D. Discount Company, said C. W. Twombly being authorized as the agent of said Discount Company for the purpose of this action to handle the funds herein.

This Agreement shall be performed by all parties within thirty (30) days from date hereof, and may thereafter be terminated

(Testimony of Myron W. Reed.)

at the option of either party by giving five
(5) days' written notice to the other.

Dated this 16th day of February, 1934.

Reed Brothers Co., a corporation

By Myron W. Reed, President

J. W. Tapley, Secretary

R. F. D. Discount Company

By H. B. Colwell, President

M. E. Dickman, Secretary.'

The next document I desire to read is plaintiff's Exhibit [337] 111:

'Re: Loan #129—Reed Bros., Tapley, Geiger Co. I, the undersigned, acknowledge receipt of the loan papers covering Reed Bros., Tapley Geiger Co., Loan No. 129. Note in amount of \$45,852.01.

Deed of Trust dated January 1, 1933, securing same.

Assignment of Deed of Trust, First Security Deposit Corporation to Metropolitan Trust Company of California, unrecorded. Assignment of Deed of Trust, First Security Deposit Corporation to....., unrecorded.

Beneficiary's Policy of Title Insurance No. 15572.

These papers relate to and cover that portion of Lot 2, Block 6, of Bell's Addition, in the City and County of Los Angeles, State of California, as per Map recorded in

(Testimony of Myron W. Reed.)

Book 2, page 467, Miscellaneous Records of said County, described as follows:

Beginning at a point in the northerly line of Washington Boulevard, formerly Washington Street, distant one hundred eighty-five (185) feet Westerly from the Southeastern corner of said lot; thence Westerly along the Northerly line of Washington Boulevard, formerly Washington Street.

(Signed) J. Howard Edgerton.

Dated: March 10, 1934.'

I will next read plaintiff's Exhibit 104, a letter on the letterhead of the First Security Deposit Corporation, Los Angeles, California, March 8, 1934:

'Metropolitan Trust Company
530 West Sixth Street
Los Angeles, California [338]

Gentlemen:

Attention: E. L. Robinson, Auditor
Re: Loan #129—Reed Bros., Tapley, Geiger Co. We desire at this time to exercise our withdrawal privilege under the trust to withdraw Loan #129, amount \$43,983.38, and ask that you execute the enclosed assignment which is made out in blank as to assignee, and also, at this time hand you

(Testimony of Myron W. Reed.)

collateral trust bonds for redemption aggregating \$47,774.47.

Very truly yours,

First Security Deposit Corporation

By (signed) E. C. Thomas

Vice President

By (signed) C. E. Perkins

Secretary-Treasurer.'

Plaintiff's Exhibit 103:

Also on the letterhead of the First Security Deposit Corporation, Los Angeles, California,
March 8, 1934:

'Metropolitan Trust Company
530 West Sixth Street
Los Angeles, California

Gentlemen:

We hand you herewith for redemption the following bonds and certificates of the First Security Deposit Corporation:

A-1046	A-1223	A-5103	A-2493	A-6973
1047	1224	5131	2535	7018
1048	1225	5199	6175	7035
1049	1226	5200	6249	7094
1050	1227	5229	6307	3157
1051	1298	2046	6312	3289
1066	1300	2110	6326	3290
1107	1301	2187	6341	3384
1115	1302	2229	6348	3386
1196	1303	2253	6395	8184
1197	1304	2256	6486	8221
1218	1305	2268	6554	8222

[339]

(Testimony of Myron W. Reed.)

1219	1306	2379	6590	8254
1220	1307	2404	6592	
1221	1398	2405	6612	
1222	5101	2479	6656	
			6737	

Very truly yours,

(signed) C. E. PERKINS

C. E. Perkins

Secretary-Treasurer.' " [340]

"Mr. Campbell: Reading now from the escrow instructions produced here by the Title Guarantee & Trust Company, referring first to plaintiff's Exhibit 101, addressed:

'Title Guarantee & Trust Company:
Los Angeles, California,

January 20, 1934.

I will hand you a trust deed and note executed by Reed Bros. Company, a corporation to Inglewood Park Cemetery Association, a corporation, on the following described property.'

Then follows a long property description.

'Above mentioned trust deed to file to secure a note for \$22,000, dated January 19, 1934, with interest accruing from date of note at the rate of 7 per cent per annum payable at Los Angeles, California; principal and interest payable in monthly installments—'

And so on. Then follows some printed matter which I will not read. Signed 'Reed Bros. Com-

(Testimony of Myron W. Reed.)

pany, by M. W. Reed, J. W. Tapley, 721 West Washington Boulevard.'

Plaintiff's Exhibit 99, escrow instructions, dated March 12th, 1934, reads as follows:

'Title Guarantee & Trust Company.

PAY \$22,000 net, as demanded for reconveyance of trust deed and release of chattel mortgage. Pay charge for Realty Tax & Service Company's form "B" follow-up service for 10 years.'

There followed instructions here, signed 'Reed Brothers Co., by M. W. Reed.'

Plaintiff's Exhibit No. 95, escrow instructions, addressed to Title Guarantee & Trust Company, Escrow Department, 5th and Hill Streets, Los Angeles, and dated March 10, 1934. [341]

'Escrow instructions in re: Reed Bros. Escrow.

Gentlemen:

We hand you herewith the following described instruments:

1. Promissory note dated January 31, 1933, in the principal amount of \$45,852.01, payable to the Railway Mutual Building & Loan Association, and signed by Reed Bros.-Tapley-Geiger Company.

2. Deed of trust dated January 1, 1933, Reed Bros. Tapley-Geiger Co., trustor, J. L. Smale and J. L. McSwiggen, trustee, the

(Testimony of Myron W. Reed.)

Railway Mutual Building & Loan Association, beneficiary.

3. Assignment of deed of trust from Metropolitan Trust Company to Reed Bros.-Tapley-Geiger Company.

4. Assignment of deed of trust from Metropolitan Trust Company to First Security Deposit Corporation.

5. Assignment of deed of trust in blank from First Security Deposit Corporation.

6. Beneficiary's policy of Title Insurance in the principal amount of \$45,853.00, from National Title Insurance Company, on the following described real property.'

There follows a property description which I shall not read.

'You are authorized to use these in the escrow when you hold for delivery to Mr. C. W. Twombly, the sum of \$22,000 in cash.

Signed R. F. D. DISCOUNT
COMPANY,
a corporation,
By M. E. DICKMAN,
Secretary.' [342]

Mr. Campbell: Plaintiff's Exhibit No. 96:

(Testimony of Myron W. Reed.)

'To the Guarantee Title & Trust Company,
Escrow Department,
Fifth and Hill Streets,
Los Angeles.
Escrow Department:

In re: Reed Brothers Escrow—

SUPPLEMENTAL ESCROW INSTRUCTIONS.

Gentlemen :

On Saturday, March 10, 1934, you were handed a promissory note, a deed of trust, an assignment of deed trust from Metropolitan Trust Co. to Reed Bros., an assignment of deed of trust from Metropolitan Trust Co. to First Security Deposit Corporation, and an assignment of deed of trust in blank from First Security Deposit Corporation.

We herewith hand you a request for a full reconveyance, properly executed by the First Security Deposit Corporation, and you may use the same under the terms and provisions of the Escrow Instructions handed you on March 10, 1934.

We ask that you kindly return to bearer the assignment of deed of trust in blank which has been heretofore handed you, as said assignment in blank is of no use to said escrow.

(Testimony of Myron W. Reed.)

Dated this 12th day of March, 1934.

R. F. D. DISCOUNT
COMPANY,
a corporation,

By (Signed) M. E. DICKMAN.'

And on the lower left-hand corner written in pencil are the words: 'Read, March 12, '34. J. H. Edgerton.' [343]

Plaintiff's Exhibit 97, Escrow Instructions dated the 16th day of March, 1933:

'Title Guarantee & Trust Company
Escrow Department
Fifth & Hill Streets,
Los Angeles.

In re: Reed Bros. Escrow

Gentlemen:

We hand you herewith a Grant Deed from The Railway Mutual Building and Loan Association to the First Security Deposit Corporation, a corporation, as to a portion of Lot A, Tract 6618, of a cemetery lot in Valhalla Memorial Park.

We hand you herewith also, a Grant Deed from First Security Deposit Corporation, a corporation, to Reed Bros.-Tapley-Geiger Co., respecting the same lot.

You are authorized to use these instructions in consummating the escrow instructions heretofore given you by the undersigned company.

(Testimony of Myron W. Reed.)

You are also authorized to use the common stock and release of chattel mortgage, heretofore handed you for the purpose of consummating this escrow, in accordance with our instructions heretofore given you. In other words, all of these instruments may be used by you when you hold for delivery to C. W. Twomly the sum of \$22,000.00.

Dated this 16th day of March, 1933.

R. F. D. DISCOUNT
COMPANY,
a corporation,
By M. E. DICKMAN,
Secretary.' [344]

The next one, Plaintiff's Exhibit 98, upon the letterhead of the First Security Deposit Corporation, Los Angeles, California, March 12, 1934:

'Title Guarantee and Trust Company
5th and Hill Streets
Los Angeles, California

Gentlemen:

Re: Reed Bros. Escrow

You have been handed by the R. F. D. Discount Company a promissory note, deed of trust, policy of title insurance, two assignments of deed of trust, and request for full reconveyance.

You are hereby authorized by this corporation to use said instruments in accord-

(Testimony of Myron W. Reed.)

ance with escrow instructions heretofore handed you and to be hereafter handed by the R. F. D. Discount Company, a corporation.

Very truly yours,

FIRST SECURITY
DEPOSIT COR-
PORATION

By (Signed) ED. C. THOMAS
Vice President

(Signed) C. E. PERKINS
Secretary-Treasurer.'

PLAINTIFF'S EXHIBIT 109:

'Full Reconveyance
Register No. 35

J. L. Smale and J. L. McSwiggen, Trustees under that certain Deed of Trust executed by Reed Bros.-Tapley-Geiger Co. formerly Reed Bros Co., a California corporation, as Trustor, dated January 1, 1933 and recorded April 13, 1933 in Book 12119, Page 169 of Official Records of Los Angeles County, [345] California, having been duly and legally requested in writing by the owner and holder of the obligation secured by said Deed of Trust, to reconvey and release the whole of the estate derived by said Trustee under said Deed of Trust, in consideration of One Dollar, receipt whereof is hereby acknowledged, Does Hereby

(Testimony of Myron W. Reed.)

Remise, Release, Quitclaim and Reconvey unto the person or persons legally entitled thereto, but without warranty, all the estate, title and interest acquired by said Trustee under the above mentioned Deed of Trust in and to the property therein granted and conveyed.

In Witness Whereof, said J. L. Smale and J. L. McSwiggen, as Trustees, have subscribed their names, this 15th day of March ,1934.

(Signed) J. L. SMALE

J. L. SMALE

(Signed) J. L. McSWIGGEN

J. L. McSWIGGEN

State of California

County of Los Angeles—ss.

On this 15th day of March, 1934, before me, the undersigned, a Notary Public in and for said County, personally appeared J. L. Smale, and J. L. McSwiggen, Trustees, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same as such Trustees.

Witness my hand and official seal.

(Signed) VIVIAN E. HOWATT
Notary Public in and for said County and
State.' [346]

(Testimony of Myron W. Reed.)

Plaintiff's Exhibit 102 which is a record of receipts and disbursements of the Title Guarantee and Trust Company, Escrow No. 965985, showing receipt deposited by Reed Bros., Tapley, Geiger and Company, being a check on the First Security National Bank, Figueroa and Adams, to the Title Guarantee and Trust Company, January 23, 1934, in the amount of \$35.00.

Deposited by Inglewood Park Cemetery Association, check on Security First National Bank of Los Angeles, Guarantee office, Title Guarantee and Trust Company, March 19, 1934, in the amount of \$22,000.

Check deposited by Reed Bros. and Company, check on Security First National Bank, Figueroa and Adams Branch, to Title Guarantee and Trust Company, March 20, 1934, in the amount of \$155.00.

Total receipts of \$22,190.

Disbursements to the Title Guarantee and Trust Company on March 26, 1934, \$126.82.

To the Bureau of Street Assessments, March 26, 1934, \$53.12.

Paid to C. W. Twombly, March 26, 1934, \$22,000.

Paid to Reed Bros. Company, March 26, 1934, \$7.56.

Paid to J. L. Smale and J. L. McSwiggen, Trustees, March 26, 1934, \$2.50.

Making a total disbursements of \$22,190.

(Testimony of Myron W. Reed.)

Plaintiff's Exhibit 100 is a check on the Title Guarantee and Trust Company, No. 32591, dated Los Angeles, California, March 26, 1934, Pay to the order to C. W. Twombly, \$22,000, drawn on the Sixth and Spring Street office of the Security First National Bank of Los Angeles, signed Title Guarantee and Trust Company, by E. W.—it is a typical banker's signature, which I cannot decipher, your Honor— [347] vice president and from the escrow funds account.

It is endorsed by C. W. Twombly, with an identification stamp identifying the signature of C. W. Twombly and his second endorsement, C. W. Twombly, and bearing the perforation of March 26, 1934.

Plaintiff's Exhibit 105, a cashier's check, drawn on the Sixth and Spring office of the Security First National Bank of Los Angeles, 1934, No. 171512, 'Pay to the order of J. Howard Edgerton, \$1,000,' signed 'W. B. Colwell, authorized signature,' and endorsed on the rear thereof, 'J. Howard Edgerton,' and showing perforations of March 27, 1934.

Plaintiff's Exhibit 106, cashier's check, drawn on the Sixth and Spring office, Security First National Bank, March 26, 1934, 'Pay to the order of R.F.D. Discount Company, a corporation, \$3,200,' signed, 'W. B. Colwell, authorized signature,' and bearing the endorsement, 'R.F.D. Discount Company, a corpora-

(Testimony of Myron W. Reed.)

tion, M. E. Dickman, secretary,' and bearing the perforation of March 27, 1934.

Plaintiff's Exhibit 107, cashier's check, drawn on the Sixth and Spring office, Security First National Bank of Los Angeles, March 26, 1934, No. 171514, 'Pay to the order of Realty Deposit Company, \$17,800,' signed 'W. B. Colwell, authorized signature, 'bearing on the reverse the deposit stamp, 'Pay to the order of Bank of America National Trust & Savings Association, Realty Deposit Company, and bearing the cancelation perforation of March 27, 1934.

I also wish to read one further exhibit. I wish to read from plaintiff's Exhibit 24, which has heretofore been identified as one of the books and records of the First Security Deposit Corporation, reading an item appearing on page 25 of the journal, and being the first item appearing on such page, the date April 15, 1934, 'Profit and loss on [348] loans receivable, Escrow No. 6, Reed Bros., to transfer loss on sale of Reed Bros. No. 129 to profit and loss account, loss was taken on sale of this property for \$17,800 cash in order to avoid having it become real estate,' and showing the loss of \$26,138.00.

The Court: Were those words 'showing the loss' yours or were they in the book?

Mr. Campbell: No; I was reading an item

(Testimony of Myron W. Reed.)

of the book, the book item is \$26,138 and the odd cents, which I referred to." [349]

Cross Examination of the Witness,
Myron W. Reed,

By Mr. Lawson:

The witness further testified: I don't think the Deed of Trust dated January 1, 1933, plaintiff's Exhibit 108 was a renewal of a previous Deed of Trust. We had another Trust Deed before this one of January 1, 1933, on our property.

"Mr. Campbell: I was going to say I will stipulate that the Reed Bros. Company had had loans over a long period of time from the Railway Mutual Building and Loan, if that will save you time, and then you can develop the amounts if you care to do so.

Mr. Lawson: Then, as I understand, it will be stipulated that this is what we term a renewal deed of trust.

Mr. Campbell: Well, I will stipulate that that replaced a former obligation on the same property, which obligation was owned by the Railway Mutual Building and Loan Association."

The witness further testified: There was no cash advanced to me or to my Company on this renewal deed of trust.

"Q. Do you have records showing the extent to which you were in default under the terms of this deed of trust? On account of interest, principal payment, taxes?

(Testimony of Myron W. Reed.)

A. No, I haven't that record but I know there was a number of months that we hadn't paid—I think we paid interest part of the time and towards the last we didn't pay anything, interest or principal, for the last month or two.

Q. Mr. Reed, in that conversation which you have stated was on or about February of 1934, will you please state now all that you can recall that was said either by you or by Mr. Edgerton, in substance, [350] not the exact words, we don't expect that, but just give us the full conversation as you recall.

A. Well, previous to this I had had an offer to reduce the loan from \$44,000 to \$22,000 by another party, and that party did not fulfill his promise and the contract ran out. I told Mr. Edgerton about it, and he told me that he thought that maybe this new company could do the same thing for us, and I said, 'Well, that is fine.' And we entered into a contract with the same proposal as I had in the first place."

Cross Examination

By Mr. Irwin:

The witness further testified: The \$22,000 which we paid into the escrow was borrowed by my Company in turn from Inglewood Park Cemetery Association; they loaned us the \$22,000 and took a trust deed back themselves for repayment against that property.

The witness further testified: That he did not have the note of which the trust deed dated Jan-

(Testimony of Myron W. Reed.)

uary 1, 1933, was given. That the monthly payments required under the note were \$735.00 a month. We were in default for the greater part of that, except for whatever interest we paid for the eight months up until the time of the deal.

"The Court: Now, gentlemen, do you understand this deal? Do you understand what he meant when he said he reduced this \$22.000?
(Jury assent).

That is all."

Thereupon plaintiff read its Exhibit No. 104 to the Jury: [351]

" 'Metropolitan Trust Company
530 West Sixth Street
Los Angeles, California

Gentlemen:

Attention: E. L. Robinson, Auditor.
Re: Loan #129—Reed Bros., Tapley,
Geiger Co. We desire at this time to exercise our withdrawal privilege under the trust to withdraw Loan #129, amount \$43,983.38, and ask that you execute the enclosed assignment which is made out in blank as to assignee, and also, at this time

hand you collateral trust bonds for redemption aggregating \$47,774.47.

Very truly yours,

FIRST SECURITY DEPOSIT
CORPORATION

by (signed) E. C. THOMAS

Vice President.

by (signed) C. E. PERKINS,

Secretary-Treas.'

Mr. Campbell: It will be stipulated that the \$47,774.47 refers to the face of the collateral trust bonds which were turned over to the Metropolitan Trust Company, and that such amount was turned over to them pursuant to the provisions of the trust agreement which, as of that date, provided that 110 per cent of the book value of any asset withdrawn from the trust must be deposited with the trust deed.

Mr. Lawson: That is right. That explains the difference between the \$47,000 and the \$44,000.

Mr. Campbell: The face principal amount; yes. And the trust agreement provided that 110 per cent of the fact principal amount of the asset withdrawn should be deposited." [352]

Whereupon plaintiff offered in evidence several documents from the files of the records of the Investment Finance Company, which said documents were received in evidence and marked plaintiff's Exhibits 170 to 177 inclusive, over the objection that the same was immaterial, irrelevant and hearsay and an exception noted.

"Mr. Campbell: At this time I wish to read these documents.

PLAINTIFF'S EXHIBIT 170:

'November 16th, 1937

Bonds purchased to date:

198 bonds Face Value \$59,376.74

Certificates: 132

1109 shares Preferred—Par Value \$22,-
180.00 at approximately \$2.10 per share.

Face Value of Bonds now outstanding:

There are many small items which can be purchased later at approximately eighty cents (80c).

Also, several blocks of bonds due November 1, 1937, which I believe can be purchased when deemed advisable, at approximately eighty cents plus interest accrued to November 1, 1937—on full paid bonds . . .

Such as:

Sidney James Hayball, Re-

dondo Beach \$4,298.55

Thomas W. Burt, Long Beach 3,100.00

Martha Crippen, Los Angeles .. 2,000.00

\$9,398.55

Harry Ramsey, 219 South Grand Avenue, Los Angeles, Full paid bond \$200.00—says he will take 80.

There are a few small bonds and certificates of Preferred, which have been lost or destroyed.

One small bond, \$14.83, name husband and wife; [353] former landlady advises husband is in jail and wife in Patton.

You requested that I advise you of the bonds purchased, amount full paid and amount accumulative . . . This information I do not have, but presume Miss Long can furnish same.

C. P. C.'

PLAINTIFF'S EXHIBIT No. 171:

December 15, 1937

PURCHASED TO DATE

232 Bonds—Par \$65,569.04 At \$46.036.30.
144 Certificates of Preferred totalling 1185 shares.

Par Value \$23,700.00

C. P. C.

C. P. CRONK.'

PLAINTIFF'S EXHIBIT No. 172:

'Jan 18—'38.

SECURITIES PURCHASED TO DATE

Present Statement

254 bonds—Total Face Value \$75,042.74
One month ago

232 bonds—Total Face Value 65,569.04

Increase

22 Bonds

Value \$ 9,473.70

Present Statement 162 Certificates Preferred Stock totaling:

1403 Shares—Par Value \$28,600.00

One Month Ago: 144 Certificates Preferred Stock totaling:

1185 Shares—Par Value \$23,700.00

Increase of:

18 Certificates—Par Value \$ 4,900.00'

PLAINTIFF'S EXHIBIT No. 173:

‘January 18th, 1938

Board of Directors [354]

Investment Finance Company

415 South LaBrea Avenue

Los Angeles, California

Gentlemen:

For the purpose of considering the next advisable step in liquidation of Bonds, permit me to express my views—

1. If you should decide to lower the bid, due to readjustment of asset value necessitated by the recent slump in the Real Estate market, I feel confident that many holders who have watched the value of their securities slowly improve, and who are waiting for a slightly higher price, would promptly become interested in negotiating for sale.

2. A raise in price would also bring in

a certain number of securities, though it would confirm in the minds of many who have been waiting for higher prices the advisability of continuing to wait.

3. There are many small items which could be picked up if I were authorized to purchase them as advantageously as possible up to ninety cents or even par on very small ones.

Suggest par up to \$50.00, and ninety cents up to \$100.00. I believe this should perhaps be the first move. I am not concerned that this would complicate matters. To those persons it could be explained the cost of auditing and bookkeeping on these small items is a loss and therefore, though paying a premium, felt it good business in order to reduce overhead.

I might add, in my opinion, if a letter were [355] sent out identical with the one approved by your committee containing a total based at sixty-five cents, it would close a good percentage of those who are waiting.

Yours very truly,
(Signed) C. L. CRONK
C. L. CRONK.'

PLAINTIFF'S EXHIBIT 174:

'Report of C. L. Cronk
March 16, 1938

288 Bonds purchased to date—	
Par Value	\$87,093.96
271 Bonds—last meeting—	
Par Value	80,282.54

Increase 17 Bonds	\$ 7,621.42
195 Certificates Preferred—	
1756 Shares—Par Value	\$35,120.00
187 Certificates Preferred—Last	
Meeting 1694 Shares—	
Par Value	33,880.00
8 Certificates—	

62 shares increase	\$ 1,240.00

For your information, we have still outstanding 70 Bonds ranging in face value from eighty-seven cents to ten dollars. Approximately ten of these small bonds are either lost or have been destroyed. It is unfortunate that some way cannot be *provised* to issue duplicates for these small items without expense of Indemnity Bond, which is a minimum of \$5.00.

I would recommend purchase of these seventy bonds at price obtainable.

(Signed) C. L. CRONK.

C. L. CRONK.' [356]

PLAINTIFF'S EXHIBIT 175

‘April 20th, 1938.

Report on Securities.

Purchase to date:

299 Bonds	Par \$95,598.80
206 Certificates	Par \$37,040.00

Comment:

I feel that we have reached the point where it is advisable to map out a definite, more adaptable and new plan of procedure.

Respectfully submitted,

(Sgd) C. L. CRONK.

C. L. Cronk.'

PLAINTIFF'S EXHIBIT 176

‘May 18, 1938

Purchased to date:

307 Bonds	Par Value	\$97,031.89
213 Certificates	Preferred—	

Total 1952 shares—Par Value 39,040.00
Information furnished by Miss Long show outstanding:

104 Bonds ranging from 87c to \$25.00

33 Bonds ranging from \$25.00 to \$50.00

13 Bonds ranging from \$50.00 to \$75.00

16 Bonds ranging from \$75.00 to \$100.00

166 Bonds ranging from 87c to \$100.00

24 Bonds aggregating \$25,578.58 — due

November 1, 1937.

RE: Bond No. A-1514 in the amount of \$2,000.00, due November 1, 1937—held by Martha Crippen—

Have talked with her son, Mr. Bruce, Attorney for Metropolitan Water District and believe I can [357] pick this up Friday morning at 75c.

This, however, is better than we can do on most 1937 maturities, but feel we should purchase 1937's at the best price obtainable.

I think it possible to deal with some of the larger holders in some manner satisfactory to both parties. For instance:

Mr. A has \$10,000.00 in Bonds—

Now, Mr. A, we are anxious to finish this liquidation as soon as possible and I believe I can secure for you 75c in cash on the dollar, or if you would like to exchange for some good mortgages we might be able to negotiate with the First Security Deposit Corporation on this basis at 80c, and if you do not wish to take the mortgages, we can perhaps get the California Federal to take same and issue you 4% certificates.

C. L. C. (Signed)

C. L. Cronk.'

PLAINTIFF'S EXHIBIT No. 177:

C. L. Cronk—Report

October 19, 1938.

Purchased to Date:

380 Bonds—	Par	\$131,289.59
371 Bonds—last report—Par		127,505.72
9 Increase		\$ 3,783.87
258 Certificates Pfd.—2,568		
shares Par		\$ 51,360.00
<u>247</u> Cert. last report—2,345		
shares Par		46,900.00
<hr/>		
11 Increase	223 shares	\$ 4,460.00

C. F. Crickelair—\$2,128.24—27

shares Preferred.

Finally contacted him personally. Doesn't need money so will hold securities. [358]

Harry H. Burkholder—\$1400.00, \$17.06, \$391.22, and five shares Preferred.

Pearl E. Burkholder—\$1400.00, \$17.07, \$391.22, \$2200.00, \$26.42 and five shares Preferred.

Have gone to 85 with them. Harry Burkholder is represented by Atty. Snyder. Mrs. Burkholder by Atty. Evarts, 604 Van Nuys Bildg. Apparently they have gotten together. Evarts says Mrs. Burkholder doesn't need money but will sell at 90 and I can pick up the bonds at any time. Otherwise, she will hold them. This would mean that we would have to

pay Harry Burkholder 90 also. Shall we pick them up or not. I will call Mr. Edgerton Thursday from downtown for answer.

L. H. Bidleman—\$14,664.82 and 78 shares Preferred.

Have personally advised him that I am finishing my work as quickly as possible. Have given him until November 1st but he is waiting until he returns to Long Beach, Jan. 1st.

Peter C. Clausen,—\$289.69 and seven shares Preferred.

Not at present price—quoted 75.

Rose H. Condley—\$335.51 and four shares Preferred.

Made final call here. . . 80. Says she will talk it over with her son-in-law and let me know.

George O. Evenson—\$800.00 and ten shares Preferred.

Will get this one next week.

C. F. Ganther—\$1180.21 and 10 shares Preferred. Called last Sunday. He is to let me know [359] in a few days.

Harold Johnson, Santa Barbara . . . \$940.49.

Wrote me that he has decided to hold same.

Mrs. A. H. Koch—\$2000.00, \$2305.72 and 54 shares Preferred. Looks favorable allowing 1.00 for 37 maturity. Am to call back next Sunday.

C. B. Nelson—\$6150.00 and 24 shares Preferred. Deal on again through Jeffers. Think will put it over this time.

Tom D. Nelson—\$942.55 and 22 shares Preferred. Domestic trouble—unable to get wife to sign as yet.

Thomas O'Brien—\$2000.00.

Have gone to 85 with him. He is to phone my home the first evening he is not working.

Gussie Parker—\$2896.25 and 27 shares Preferred. Working now at Huntington Hotel, Pasadena. Can make deal as soon as we can contact.

John Patchett — \$236.39 and 3 shares Preferred. Called Sunday. He agreed to bring securities in but his wife backed out. Will have to see them again.

H. L. Raley—says he will be in to see Mr. Edgerton.

This report is rather hurried. I have talked with Mr. Edgerton. Don't know as yet just when I have to be in Washington —perhaps not until December 1st now. There is time enough to make a final drive as far as my work is concerned, on the entire list. I would like to have the new letter approved so that I can start Friday morning.

As mentioned heretofore, would like to pick [360] up the Burkholder securities, though I feel I am being pressed—but, we

should not let that interfere with the smart thing to do, which is, as I see it now, to get in all we can.

Respectfully submitted,
C. L. CRONK.' [361]

Thereupon the court made the following statement:

"The Court: I think the thing is for a lawyer to protect his record and then he can determine that later, but I think we have got the record protected here. If there was any time that I thought it wasn't, I tried to call your attention to it. I might say, in that regard, that when I have said to you the same ruling would apply, I mean that that carries with it the exception that has been running through here."

Thereupon the following proceedings were had:

"Mr. Campbell: There has been prepared during the interval a chart based upon the stipulation which has heretofore read into evidence as to the corporate structure of the First Security Deposit Corporation and the Investment Finance Company, together with the official positions occupied by each of the defendants in those two companies, with the date which they occupied those positions.

The matters set forth there, being identical

with those contained in the stipulation. I ask at this time to have these charts received in evidence as plaintiff's Exhibits next in order, in order that they may remain in the court room.

The Court: There being no objection, they may be received in evidence.

Mr. Irwin: No objection other than the objection that went to the evidence itself. There is no objection to them as exhibits.

Mr. Boller: We make the same objection that has been running right through.

The Court: Yes, the objections made originally [362] when the stipulation was prepared will run through here."

(Said documents were received in evidence and marked plaintiff's Exhibits 178 and 179 respectively. Said Exhibits are separately certified pursuant to stipulation and order of Court.)

CLARENCE M. BRUCE,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

"Q. Now I will ask you, Mr. Bruce, if you have examined the books of account of the First Security Deposit Corporation which have heretofore been placed in evidence and which books are as follows: Plaintiff's Exhibit 22, journal

(Testimony of Clarence M. Bruce.)

and check register of the First Security Deposit Corporation; Plaintiff's Exhibit 23, journal and check register of the First Security Deposit Corporation; Plaintiff's Exhibit 24, cash records, check records, journal and bond register of the First Security Deposit Corporation; Plaintiff's Exhibit 25, cash receipt journal of the First Security Deposit Corporation; Plaintiff's Exhibit 26, conversion ledger and bond register of the First Security Deposit Corporation; Plaintiff's Exhibit 27, record of closed accounts, loan repayments of the First Security Deposit Corporation; Plaintiff's Exhibit 28, real estate ledger of the First Security Deposit Corporation; Plaintiff's Exhibit 29, general ledger of the First Security Deposit Corporation; plaintiff's Exhibit 30, general ledger of the Realty Department of the First Security Deposit Corporation; plaintiff's Exhibit 31, a stock ledger of Class A and B preferred, and Class C common stock of the First Security Deposit Corporation; [363] Plaintiff's Exhibit 32, transfer binder for A and B preferred stock and Class C of the First Security Deposit Corporation; and Plaintiff's Exhibit 33, binder of purchase invoices of the Realty Deposit Company between the dates of November 1, 1933, and November 10, 1936, and I will ask you if you have examined each of such exhibits?

A. Yes, I have.

Q. Now, in making such examination have

(Testimony of Clarence M. Bruce.)

you examined the entries made in such books and drawn summaries therefrom?

A. Yes, sir.

Q. And in that connection I will ask you if you have made an examination of such books of the First Security Deposit Corporation for the purpose of ascertaining the number and face amounts of bonds of the First Security Deposit Corporation acquired or required such corporation at large? A. Yes, sir.

Mr. Irwin: May I make this inquiry, may it please the Court: All these exhibits were received subject to a motion to strike. I just want to be sure, Your Honor, but I won't be delinquent. If I apprehended the Court's ruling, there shouldn't be a motion made at this time to strike any of those exhibits because of any lack of foundation. That all goes at the end of the Government's case. Am I correct in that?

The Court: That is correct. You won't be waiving your right.

Mr. Irwin: That is right. If the foundation has not been laid, wherever the objection so appears, and that it need not be renewed, and the motion need not be made at this time.

[364]

The Court: That is correct. It may be reserved until the end of the Government's case."

The witness further testified: That based upon

(Testimony of Clarence M. Bruce.)

such examinations, I have determined the face amounts of the bonds, that is the principal amount, by years acquired by First Security Deposit Corporation. I have determined the face amount or principal amount of bonds acquired at a discount by such corporation. I have ascertained the amount paid by such corporation for such discounted bonds. I have ascertained the average amount paid for such discounted bonds. I have ascertained from the books and records that you outlined to me, the face or principal amount of bonds received by the First Security Deposit Corporation on loans or es-
crows. I have ascertained the face amount of bonds paid off at 100% by such corporation. I have also ascertained from such accounts the principal amount of bonds acquired from the Investment Fi-
nance Company. I have ascertained which bonds were acquired from Investment Finance Company at cost to Investment Finance Company. I have ascertained the quantity of bonds received by the First Security Deposit Corporation from the In-
vestment Finance Company in exchange for real property. I have ascertained the principal amount of bonds received by the First Security Deposit Corporation in exchange for first trust deeds be-
longing to the First Security Deposit Corporation. I have ascertained the principal amount of bonds of the First Security Deposit Corporation received by that corporation from the Investment Finance Company and applied on the principal or interest of debts owing to the First Security Deposit Cor-

(Testimony of Clarence M. Bruce.)

poration from the Investment Finance Company. I have ascertained what interest was added to the principal amount of such bonds and credited to the account of Investment Finance Company by First Security Deposit Corporation. I have summarized the figures of each of those accounts by years. [365]

"Q. Will you state by years the principal amount of bonds acquired by First Security Deposit Corporation, segregating those amounts into first, the total face of bonds acquired, the total amount of bonds discounted; first, as to the face, or principal amount; secondly, as to the amount paid for such discounted bonds; thirdly, as to the average rate paid; stating the face amount of bonds received on loans or escrows; stating in addition the bonds paid off by First Security at 100 per cent during the course of such year and during such periods or years as bonds were acquired from the Investment Finance Company; stating the figure or price at which received; stating whether or not they were received in exchange for real estate, in exchange for trust deed, or applied on principal or interest on debts owing from the Investment Finance Company to the First Security Deposit Corporation; and stating in addition thereto any interest added to the face amount of such bonds and allowed to Investment Finance Company.

Mr. Lawson: Your Honor, it is rather a long question to anticipate every part of it.

(Testimony of Clarence M. Bruce.)

There is no objection, of course, to the face amount of the face of the bonds acquired, nor as to the statement of the amount by years. There is an objection to the statement of any amounts acquired at discounts unless the discount is with reference to the market prices. That is a discount below the market prices as alleged in the indictment. The same would apply to the average amount of discounts, unless the average amount of discounts would be those discounts below the market price or prices; not within the issues of the case; it is immaterial.

The Court: Read the question. [366]

(The question referred to was read by the reporter.)

* * * * *

Mr. Lawson: The objection is that any statement by this witness or any evidence relative to discounts or any related matters involving discounts is immaterial and incompetent, and not within the issues of this case unless it be shown that the discount or discounts were below the market prices as referred to in the indictment, and particularly on page 4, the third paragraph from the top; that is, unless it be shown that the discount was from the market price, that it has no place within the issues of this place in any Count of the indictment. Any other discount is not alleged as part of any scheme.

(Testimony of Clarence M. Bruce.)

Mr. Campbell: Possibly there is some confusion in the use of the word 'discount.' My use of the word in the question to the witness is as to the difference between the price paid as disclosed by the books and the face amount of the securities, and I will reframe my questions so that that word is eliminated and in connection with the indictment which alleges that the defendants did depress and cause to be depressed the market price of the said securities of the First Security Deposit Corporation so that the defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.

This evidence is going to the acquisition at a price less than the par value thereof, and not as to the first portion as to their actual depressing or causing to be depressed.

I think that statement will probable clarify [367] the use of the word 'discount' to which counsel's objection is apparently addressed.

* * * * *

The Court: Well, may we not take the question as it has been read, which seems to be clear, with the added feature that the discount is the discount below the face of the bonds to which he is referring, and then your objections would be pertinent.

Mr. Irwin: Very, well, I join in the objection of Mr. Lawson, and add the additional

(Testimony of Clarence M. Bruce.)

objection which I made a moment ago, and I likewise wish to add the further objection that it is hearsay as to the defendants, if I didn't mention that before, and no foundation has been laid."

(The following proceedings were had between court and counsel outside the presence of the jury.)

"Mr. Irwin: I am directing my attention to paragraph 3 page 4, directing my attention particularly to the objection as to the immateriality and the lack of foundation. The other objection is hearsay. They require no comment at this time as they go under the regular subject that has come up, properly subject to a motion to strike.

Your Honor will note the phrase there, I respectfully submit that is conjunctive: 'Defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.'

I submit, your Honor, that we have no evidence, there hasn't been a single item of evidence, tending to support [368] the first part of the conjunctive statement, namely, that they did anything, at any place along the line, to cause these to be depressed.

I submit, therefore, your Honor, that it then

(Testimony of Clarence M. Bruce.)

is immaterial. The mere fact that the bonds had a face value of \$100 and might have been bought for \$40 itself does not tend to prove or disprove any of the issues set forth in that conjunctive allegation.

The Court: That was the thing that I wanted to bring specifically out into the record because of the wording of this indictment and the wording of the question.

It seems to me that there are two necessary phases of proof in that paragraph in the indictment. If it could conveniently be done to put the first in first, that would be all right, but I don't see that there is any particular necessity for it so long as it comes forward before the end of the case.

The first element is 'That the defendants did depress and cause to be depressed the market price of the said securities.' That is the first element.

The second element is they did that 'so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value.'

Now, both elements have got to be proven.

You see that 'did' is the element in there. The Government has got to prove that they did because they alleged that they did and this is the proof.

Mr. Irwin: I appreciate that the Court does

(Testimony of Clarence M. Bruce.)

have in mind unless we get that first allegation there—

The Court: That is an important allegation in the indictment, and proof will have to be coming in to [369] connect those two together in order for the Government to make its case, and then if they don't, you can move to strike.

Mr. Irwin: Then the ruling is the question is considered as still being in the record so these objections may not be repeated.

* * * * *

Then do I understand, your Honor, that the question is reinstated, as originally stated by Mr. Campbell with the deletion of the phrase 'discount.'

The Court: With the explanation of what he means by that phrase.

Mr. Irwin: That is still before the Court.

The Court: That is right.

Mr. Irwin: And the objections made by Mr. Lawson and myself and Mr. Adams to that question are overruled and exception allowed, subject to the motion to strike.

The Court: That is right. As to all defendants.

Mr. Lawson: I might state my position with reference to that is that the price at which the bonds were acquired must necessarily be below the market price.

The Court: Ultimately they have go to prove that under their indictment there, either

(Testimony of Clarence M. Bruce.)

by direct or other evidence, but there are two elements to this, and this proof is directed to the second element of the third paragraph on page 4 of the indictment.

Mr. Campbell: We are only proving the ultimate fact of the price at which they were acquired by this witness, not what the market price was or should have been.

* * * * *

Mr. Irwin: I overlooked one additional point, so that the Court will have it in mind. In connection with [370] the objection of immateriality, that phrase in the indictment is 'So that defendants might and did acquire.' All this testimony is going to show what the First Security acquired as a corporation. I think counsel will agree that this question does not call and will not develop an answer that any of the defendants acquired the shares.

The Court: It says 'directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown.' There is that limitation as to companies.

That objection will also be overruled subject to the same objection and same ruling.

Mr. Irwin: So we won't have to interrupt again, I am anxious to have this come in as coherently as possible, might it be understood that the objection runs to the whole line of testimony and need not be repeated?

(Testimony of Clarence M. Bruce.)

The Court: Yes.

Mr. Campbell: So stipulated.

The Court: Now the question with the explanation and the objection will be re-instated, and you may answer."

Thereupon the question was read and the witness answered the same, "1932, the First Security acquired a total of \$9,548.43 in bonds, all of which were at 100 per cent paid off."

"Q. Mr. Bruce, do you mean by that that the face amount was paid for those bonds?

A. Yes, sir.

Q. Very well. Proceed.

The Court: What do you mean, 'face amount'? Principal amount or principal plus accrued interest?

The Witness: Principal amount.

1933, the First Security acquired a total of \$50,458.79 [371] in face principal amount of bonds. Of this amount, \$25,813.02 was purchased at a discount for which First Security paid \$6,943.33 at an average rate of 27 per cent.

The Court: 27 per cent of what?

The Witness: The first principal amount. Bonds purchased at 100 per cent for that year amounted to \$24,645.77 which is the principal amount without interest. These were matured bonds. They matured at the date they were purchased or prior to that time. 1934, the First Security acquired a total of \$563,696.88

(Testimony of Clarence M. Bruce.)

face principal amount of the bonds. Of this amount \$411,314.32 were at a discount for which they paid \$140,355.60, which is an average rate of 34 per cent. That is the face principal amount. Received on loans or escrow at 100 per cent, \$152,382.56. In 1935, they acquired bonds having a face principal amount of \$237,734.34. Of this amount, \$190,715.61 was acquired at a discount for which First Security paid \$79,633.11, which is an average rate of 42 per cent to the face principal amount.

Bonds received on loans or escrow at 100 per cent amounted to \$35,978.92. Bonds paid off at 100 per cent, \$11,039.81.

In 1936, First Security acquired a total of \$59,168.18 in bonds. Of this amount, \$20,282.07 were at a discount for which they paid \$11,137.31, which is an average rate of 54 per cent, of face amount of the bonds. Received on loans or escrow at 100 per cent, \$1,157.11. Bonds paid off 100 per cent, \$18,972.31.

Received from Investment Finance Company at 100 per cent in exchange for real estate, \$18,756.69. Included [372] in the bonds acquired at a discount were bonds having a face value of \$6,495.85 acquired from Investment Finance Company at a cost of \$3,036.79.

Mr. Irwin: And, your Honor, his use of the word 'discount' will be used in the light of counsel's explanation?

The Court: That is my understanding.

(Testimony of Clarence M. Bruce.)

That is the way you are using the term? That is discount below the face principal amount?

The Witness: That is correct.

Mr. Campbell: Q. Proceed.

A. 1937, the First Security acquired bonds leaving a face principal amount of \$49,614.41. Included in this were bonds paid off at one hundred per cent in the amount of \$85.55. Bonds received from the Investment Finance Company at one hundred per cent in exchange for real estate amounted to \$2,754.69. Received from the Investment Finance Company to apply on the debt or interest due First Security in the amount of \$46,774.17. Interest added to these bonds, received from Investment Finance Company was \$6,295.61.

1938, the First Security acquired trust bonds having a face principal amount of \$65,755.33, all of which were acquired from Investment Finance Company as follows: In exchange for first trust deed \$20,206.07; to apply on the debt or interest due First Security \$45,549.26; interest added to the face principal amount of these bonds amounted to \$13,144.43. When I referred to the years 1937 and 1938 to interest added, this was credit given to the Investment Finance Company for these amounts of interest. [373]

1939, total bonds acquired amounted to \$231,-672.79. Bonds paid off at one hundred per

(Testimony of Clarence M. Bruce.)

cent amounted to \$131,279.53. Bonds acquired from the Investment Finance Company in exchange for first trust deeds amounted to \$29,-790.74. Bonds received from Investment Finance Company to apply on the debt or interest due First Security amounted to \$70,-602.52. Interest added to bonds acquired from Investment Finance Company amounted to \$16,777.21. Credit was given to the Investment Finance Company for that amount of interest."

The witness further testified: Bonds were acquired in 1937 and 1938 by the First Security Deposit Corporation other than those acquired from the Investment Finance Company; in 1937 bonds bought in the amount of \$85.55 were paid off 100 per cent; aside from those, there were no other bonds acquired; these were matured bonds. In 1938, no bonds were acquired other than those acquired from the Investment Finance Company.

"Q. And Mr. Bruce, were all bonds acquired from the Investment Finance Company during the period you repeated with the exception of the item \$6,495.00 worth of bonds which you referred to as having been acquired for \$3,000.00 some odd dollars acquired at one hundred per cent plus accrued interest from the Investment Finance Company?

A. Not in all instances, no, sir.

Q. In the course of the year 1939, Mr. Bruce, from your examination of those books

(Testimony of Clarence M. Bruce.)

and records, were all of the bonds of the Investment Finance Company retired or deposits made for such purpose with the Metropolitan Trust Company?

A. Yes, sir. On December 31st, 1939, there was a [374] total—bonds outstanding totalling \$17,891.31 plus accrued interest of \$4,032.17, totalling \$21,923.48, which amount was deposited in the Metropolitan Trust by First Security to cover all outstanding bonds.

Q. Yes. So far as the company's books and records were presented were retired as of the 31st day of December, 1939?

A. That is correct.

Q. Mr. Bruce, will you give us a total of the figures which you gave heretofore from the period November, 1932, to December 31st, 1939?

A. Total face value principal amount to bonds acquired amounted to \$1,267,649.15, of which amount discounted bonds at a face principal amount of \$648,125.02, for which the First Security paid \$238,069.35 for an average rate of 36.7 per cent. That is to say, 36.7 per cent of the face amount of such bonds. Bonds received on bonds, or escrow, at one hundred per cent amounted to \$189,508.59. Bonds were paid off one hundred per cent \$195,571.40. Bonds received from the Investment Finance Company for the following purposes: the cost bonds leaving a principal amount of \$6,495.85 for

(Testimony of Clarence M. Bruce.)

which Security paid Investment \$3,036.79. In exchange for real estate bonds leaving a face principal amount of \$21,511.38. In exchange for First Trust deed bonds leaving a principal amount of \$49,996.81.

Bonds acquired on the debt or interest due First Security, \$162,925.95. Interest added to bonds traded for first trust deeds are applied on the debt or interest due on the debt in the amount of \$36,217.25." [375]

The witness further testified: The total face amount of bonds acquired by First Security in December of 1934 amounted to \$22,504.79; of this amount, discounted bonds had a face principal amount of \$21,332.06; for which the First Security paid \$6,565.42 for an average rate of 31 per cent. Bonds received on loans or escrow 100 per cent amounted to \$1,172.73.

"Mr. Campbell:

Q. Mr. Bruce, have you also examined the books and records of the Investment Finance Company, which have been produced here in evidence, namely, plaintiff's Exhibit 39, being the record of cash receipts and journal for the period from October 5, 1935, to January 1, 1936, of the Investment Finance Company; Exhibit No. 40, the general ledger of the Investment Finance Company; Exhibit 41, also the general ledger of the Investment Finance Company; Exhibit 42, being the cash journal, check, security, and sales record of the Investment Fi-

(Testimony of Clarence M. Bruce.)

nance Company for the period from January 1st, 1936; Exhibit 43, the cash, check and journal record of the Investment Finance Company for the period from January 1st, 1940, to August 31, 1940; and Exhibit 45, being purchase order records of the Investment Finance Company? A. Yes.

Q. In that connection have you examined the entries made in such books and drawn summaries therefrom? A. Yes.

Mr. Irwin: I don't think I made it clear, your Honor. If this is a different company, may we have the same understanding as to what I referred to as the First Security?

The Court: Same objection as to all defendants; same ruling; same exception." [376]

The witness further testified: That in connection with such examination, he examined such books and such entries for the purpose of ascertaining the quantities and the times that bonds of the First Security Deposit Corporation were acquired by Investment Finance Company. I ascertained the date and face amount of the bonds so acquired. By face amount I refer to principal amount. I ascertained the amount paid by Investment Finance Company for such bonds. I ascertained the average rate paid by Investment Finance Company, that is, the percentage of the amount paid to the principal amount of such bonds. I ascertained the disposition of such bonds by the Investment Finance Company after

(Testimony of Clarence M. Bruce.)

their acquisition. I ascertained from such examination whether or not interest upon the principal amount of such bonds was received by Investment Finance Company from First Security Deposit Corporation. I ascertained the total amounts of bonds turned over to First Security Deposit Corporation by Investment Finance Company; and escertained the costs to Investment Finance Company of the bonds turned over to First Security Deposit Corporation. I ascertained the application of such bonds, whether they were exchanged for real estate, exchanged for first trust deeds owned by First Security Deposit Corporation, or applied on principal or interest on debts owing from the Investment Finance Company to the First Security Deposit Company. I ascertained the total paid or allowed the Investment Finance Company by the First Security Deposit Corporation on account of bonds applied on principal or interest, or exchange for assets.

"Q. Mr. Bruce, will you state by years the face value of bonds of the First Security Deposit Corporation acquired by the Investment Finance Company; the amount of cash paid therefor by the Investment Finance Company; and the average rate applied; that is to say, the average of the face value for which they were acquired; the amount [377] of interest added thereto while in the possession of Investment Finance Company; stating also the disposition of such bonds by the Investment Finance Com-

(Testimony of Clarence M. Bruce.)

pany, and in such connection stating the face amount of bonds turned over to the First Security Deposit Corporation; stating the cost to Investment Finance Company; the application made of such bonds; and the total paid or allowed Investment Finance Company by First Security Deposit Corporation for such bonds; and state the figures slowly, if you will, so that counsel may follow you.

A. For the year 1935, that is October through December 31—

Q. Pardon me. May I amend my question to also add: Bearing in mind the fact that Investment Finance Company was organized August 30, 1935.

A. 1935. Investment acquired First Security bonds having a face principal amount of \$6,376.75; for which they paid \$3,114.99, for an average rate of 48.8 per cent. No interest was added to these bonds.

They were transferred to First Security as follows: In exchange for real estate, bonds having a face principal amount of \$740.89, bonds sold to First Security, having a face principal amount of \$5,635.86, for which Investment received from First Security \$2,-771.16.

Q. Just at that point, Mr. Bruce, that was the same figure at which Investment Finance Company had purchased those particular bonds?

(Testimony of Clarence M. Bruce.)

A. Yes, that is correct.

Q. You may proceed.

The Court: A cash transaction?

The Witness: Yes.

1936, Investment Finance Company acquired First Security [378] Trust bonds having a face principal amount of \$30,184.78; for which they paid \$19,308.92, for an average rate of 64.3 per cent, interest in the amount of \$1,166.61 was added to these bonds which were transferred to First Security Deposit Corporation for the following purposes: to apply on principal debt or interest on debt due First Security. Bonds having a face principal amount, plus accrued interest, totalling \$8,165.27; bonds in exchange for real estate having a face principal amount of \$20,770.49; bonds having a value of face principal amount plus accrued interest in exchange of First Trust deeds in the amount of \$1,549.64; bonds transferred to First Security at cost having a face principal amount of \$859.99, which bonds cost Investment Finance Company \$265.63. The total that was paid to Investment or credited to Investment for all bonds turned over during the year 1936 was \$30,751.03. 1937: Investment acquired First Security bonds having a face principal amount of \$100,238.29; for which they paid \$71,015.43 for an average rate of 70.8.

Interest in the amount of \$17,980.28 was

(Testimony of Clarence M. Bruce.)

added to these bonds and they were then transferred to First Security as follows:

To apply on the principal or interest of the debts due First Security, bonds having a face principal amount, plus accrued interest, in the amount of \$9,638.23; and in exchange for first trust deeds, bonds having a face principal amount, plus accrued interest, totalling \$21,580.34.

The total received by Investment Finance Company from First Security for all bonds transferred in 1937 amounted to \$118,218.57.

[379]

1938. Investment Finance Company acquired First Security trust bonds having a face value of \$92,057.17, for which they paid \$72,810.48, for an average of 79 per cent.

Accrued interest in the amount of \$14,641.51 was added to these bonds, and they were then transferred to First Security for the following purposes: to apply on the principal or interest of the debt due First Security, bonds having a face principal amount, plus accrued interest, totaling \$76,483.06; in exchange for first trust deeds, bonds having a face principal amount, plus accrued interest, value totaling \$30,215.52.

The total received from First Security by Investment Finance Company for 1938 amounted to \$106,698.68 for these bonds.

(Testimony of Clarence M. Bruce.)

1939: Investment Finance Company acquired First Security trust bonds having a face principal amount of \$12,073, for which they paid \$12,755.84, which is the face principal amount, plus interest, for an average rate of 1.056.

After adding interest of \$2,434.85 to such bonds, they were transferred to First Security Deposit Corporation and applied as follows: On the principal amount, or interest due on the debt due First Security, bonds having a face principal amount, plus accrued interest, totaling \$13,671.85.

In exchange for first trust deeds, bonds having a face principal amount, plus accrued interest, totaling \$8.036.

The total received by Investment Finance Company from First Security for all bonds transferred in 1939 amounted to \$14,507.85.

[380]

"Q. Mr. Bruce, with reference to these schedules you have just been giving on the Investment Finance Company and, particularly, with reference to the disposition of bonds received, let me ask you this: If in that connection you are stating the distribution of bonds during the year for which such figure is given without respect to when the particular bond was acquired?

The Witness: The distribution, the figures given relate to the particular year they were

(Testimony of Clarence M. Bruce.)

acquired. The distribution may vary. If I may explain what I mean there. For example, the Investment Finance might purchase, say, in January of 1939 \$500 in bonds. Now, it may be March, April, May, July or August before those bonds went over to First Security, but the figures I gave is the distribution of that \$500 in bonds for January without regard to the date at which they went over.

Q. Will you state, Mr. Bruce, the total face amount of bonds of the First Security Deposit Corporation acquired by the Investment Finance Company during the existence of that company?

A. \$240,929.99.

Q. And what amount of those bonds were purchased at a price less than the face amount thereof?

A. \$232,889.33.

Q. What was the cost to Investment Finance Company of that \$232,889.33 worth of bonds?

A. \$169,672.09."

(Thereupon plaintiff interrupted the examination of said witness to read certain Exhibits to the Jury.) [381]

"Mr. Campbell: I am going to read from the minutes of May 25, 1938, of the Board of directors of the Investment Finance Company, which is taken from plaintiff's Exhibit 36:

'The following directors were present:

(Testimony of Clarence M. Bruce.)

Messrs. R. W. Starr, E. C. Thomas, J. L. Smale, A. R. Ireland, C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton and Mr. C. L. Cronk were present.

On motion of Mr. Smale, seconded by Mr. Thomas and carried, it was resolved that this company pay up to 80 cents on the dollar on First Security Deposit Corporation bonds.

Signed: R. W. Starr, Chairman; C. W. Twombly, secretary.'

Minutes of June 1, 1938, also a portion of plaintiff's Exhibit 36, a minute of the regular meeting of the Board of Directors of Investment Finance Company:

'The following directors were present:

Mr. R. W. Starr

E. C. Thomas

J. L. Smale, and

Alfred R. Ireland,

C. W. Twombly.

In addition to the directors,

Mr. J. H. Edgerton,

Charles L. Cronk were present .

On motion of Mr. Thomas, seconded by Mr. Smale and carried, it was resolved that Mr. Edgerton and Dr. Starr act as a committee to approve purchase of bonds of the First Security Deposit Corporation of not to exceed 85 cents on the dollar.' [382]

(Testimony of Clarence M. Bruce.)

Omitting the rest of the minutes, signed, 'R. W. Starr, Chairman, C. W. Twombly, Secretary.'

From the minutes of July 20, 1938, also a portion of Government's Exhibit 36, regular meeting of the Board of Directors of Investment Finance Company:

'The following directors were present:

Mr. R. W. Starr

E. C. Thomas,

J. L. Smale,

A. R. Ireland,

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading only a portion:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, it was resolved that Mr. Cronk's employment be extended for a period of one month.'

Signed, 'R. W. Starr, Chairman, C. W. Twombly, Secretary.' The minutes of October 19, 1938, also from Government's Exhibit 36. Regular meeting of the Board of Directors of the Investment Finance Company, October 19, 1938:

'Messrs. R. W. Starr,

C. W. Twombly

A. R. Ireland,

E. C. Thomas,

J. L. Smale,

(Testimony of Clarence M. Bruce.)

In addition to the directors, Mr. J. H. Edgerton and Florence Long were present.'

Reading only a portion:

'Upon motion of Mr. Thomas, seconded by Mr. Smale, and carried, Mr. Twombly voting no, it was resolved that Mr. Cronk's employment be extended upon the same terms and conditions to and including [383] November 16, 1938, unless terminated sooner by himself.'

I will not read the remaining portion of the minutes. Signed 'R. W. Starr, Chairman; Florence Long, Secretary.'

Q. Now, Mr. Bruce, have you also examined the books and records of the First Security Deposit Corporation with reference to certain transactions relative to a first trust deed in the amount of \$43,983.38 owned by the First Security Deposit Corporation and secured by certain property of Reed Bros., Tapley and Geiger Company?

A. Yes, sir.

Mr. Adams: If your Honor please, there is, of course, and has been an objection made to this entire Reed Bros., Tapley matter which concerns Reed Bros., Tapley and R. F. D. And part of it was made, and part of it was overruled and part of it reserved. And now they are going into that transaction again and may

(Testimony of Clarence M. Bruce.)

those same objections be made as were made previously and the same ruling?

The Court: The objection is considered to be made, and the same ruling.

Mr. Irwin: That is as to all defendants. And may the additional objection that was made at the outset of this testimony with reference to the First Security, be made, when we addressed your Honor at the bench?

The Court: Yes. The same objections may be deemed to have been made and the same ruling. As to all defendants.

Mr. Lawson: My understanding is, your Honor, that this is a continuing objection."

The witness thereupon testified: That he had examined plaintiff's Exhibit 103, a letter addressed to the Metropolitan [384] Trust Company, dated March 8th, 1934, and plaintiff's Exhibit 104, a letter also addressed to the Metropolitan Trust Company; that he has also examined the list of bonds set forth therein. I have ascertained from the books of the First Security Deposit Corporation, by whom such bonds were held as of and immediately prior to the 8th day of March, 1934; that the books and records did not disclose that those bonds at that time or at any time were the property of or standing in the name of the R. F. D. Discount Company, Inc. I found that the total face amount of the bonds referred to in plaintiff's Exhibit 103, was \$47,774.47.

(Testimony of Clarence M. Bruce.)

"Mr. Irwin: I don't know whether to this particular line I have ever interposed the objection that it is not within the issues of the indictment.

The Court: The objection may be deemed to have been made and overruled subject to being connected up."

Mr. Lawson: I think it was stated at the time when the matter originally came up—that the difference between the 43,000 plus and the 47,000 plus that was deposited in the trust company represents the additional 10 per cent that was required by the terms of the trust agreement?

Mr. Campbell: Yes, I think we so stipulated, that the company under the terms of the trust agreement to withdraw a security at that time had to deposit in excess of the face amount of that security of bonds for redemption in order to withdraw it.

The Court: That is correct."

The witness further testified: Referring to the bonds set forth in plaintiff's Exhibit 103, that bonds having a face principal amount of \$29,336.42 belong to First Security Deposit Corporation; bonds having a face principal amount of \$6,897.90 were on hand as collateral on loans and were held by the First [385] Security Deposit Corporation. Bonds having a face principal amount of \$11,540.15 were borrowed by First Security from outside parties

(Testimony of Clarence M. Bruce.)

to keep the total of \$47,774.47; these were borrowed from the following persons in the following amounts: A. R. Ireland \$2,400; R. W. Starr \$538.41; Aaron L. Johnson or Nell B. Johnson \$242.37, plus \$51.83; A. L. Johnson \$1.20; Catherine B. Terry, or Nell B. Johnson, \$256.55; and Scott W. or R. E. Derrick, \$7918.69. The figures referred to are the face amounts of the bonds borrowed. These bonds subsequently were returned to those parties from whom they were borrowed in the same face amounts. In the instance of Mr. Ireland, a similar amount was returned on April 26th, 1934, in the instance of Dr. Starr, Aaron L. or Nell B. Johnson, or C. B. Terry—bonds were returned on May 3, 1934, and to Scott W. or R. E. Derrick on May 28, 1934. With reference to the \$6,897.90 amount of bonds held as collateral by the First Security, credit was given on the loans in such amount to the individuals who had put up collateral with the Company. This transaction was carried through the division of the First Security Deposit Corporation known as the Realty Deposit Company, and entries set up on the books in connection with this transaction. The entry reflecting a loss of \$26,183.38 on the transaction, and receipt of cash in connection with this transaction of \$17,800.00.

“Mr. Campbell: At this time I wish to read from Government’s Exhibit 36, the minutes of the Investment Finance Company—from the minutes of the Investment Finance Company for November 9, 1936, reading in part:

(Testimony of Clarence M. Bruce.)

'Special meeting of the Board of Directors of Investment Finance Company. The following directors were present: Messrs. R. W. Starr, J. H. Edgerton, E. C. Thomas, C. W. Twombly, J. L. Smale.

Upon motion of Mr. Thomas, seconded by Mr. Edgerton, and carried, it was resolved as follows: [386]

Whereas, it appears for the best interests of this corporation that substantially all of the assets of the Consolidated Investors, a California Corporation, be purchased by this corporation for a sum not to exceed \$36,000 in cash,

Now, Therefore, Be It Resolved, that the officers of this company be, and they are hereby, authorized to negotiate, enter into all these contracts with respect to, and execute any and all necessary instruments necessary to complete the purchase of substantially all of the assets of the Consolidated Investors, a California corporation, including the following securities:

3,375 shares common stock of the First Security Deposit Corporation;

2,331 shares of Class A preferred stock of the First Security Deposit Corporation with a total par value of \$46,620.00;

827 shares of Class B preferred stock of the First Security Deposit Corporation with a total par value of \$16,540.00;

(Testimony of Clarence M. Bruce.)

209 full-paid income shares of the Railway Federal Savings and Loan Association, with a total par value of \$20,900.00;

Said shares in the amount of \$15,000 being subject to a hypothecation agreement with one F. E. Jones, said hypothecation agreement being guaranteed by R. W. Starr, J. H. Edgerton, A. R. Ireland, E. C. Thomas, F. A. Anderson, and W. S. Bratton.' Omitting the remainder of such minutes, signed 'R. W. Starr, chairman; C. W. Twombly, secretary.' " [387]

"Mr. Campbell: At the termination of the morning session I had just read from the minutes of the Investment Finance Company directors' meeting of November 9, 1936. At this time I wish to read from the minutes of the Board of Directors of the Investment Finance Company for January 19, 1938, which is a portion of plaintiff's Exhibit 36, reading in part:

'Regular meeting of the Board of Directors of Investment Finance Company, January 19, 1938.

The following directors were present:

Messrs: R. W. Starr,

E. C. Thomas,

J. H. Edgerton,

J. L. Smale,

T. W. Twombly.

In addition to the directors, Mr. A. R. Ireland was present.'

(Testimony of Clarence M. Bruce.)

Reading only in part:

'On motion of Mr. Smale, seconded by Mr. Thomas and Terry, it was resolved that Mr. Twombly and Mr. Edgerton placed such value as they saw fit on assets purchased from the Consolidated Investors in order that the segregation values could be determined.'

The minutes are signed by 'R. W. Starr, Chairman, C. W. Twombly, Secretary.'

Reading now from the minutes of August 17, 1938, a portion of plaintiff's Exhibit 36:

'Regular meeting of the Board of Directors of the Investment Finance Company, August 17, 1938.

The following directors were present:

Messrs. R. W. Starr, [388]

E. C. Thomas,

J. L. Smale,

A. R. Ireland,

C. W. Twombly.

In addition to the directors. Mr. J. H. Edgerton was present.'

Reading only in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, it was resolved, that the various assets purchased from the Consolidated Investors be individually valued as per the value set opposite each asset on the annexed descriptive valuation list.'

(Testimony of Clarence M. Bruce.)

There is attached to such minutes an exhibit headed, and reading such exhibit in full:

'\$36,000 paid to Consolidated Investors for the following: First Security Deposit Corporation stock, 2,331 shares, Class A preferred, valued at \$4.50 per share, value \$10,489.50; 827 shares, Class B preferred, valued at \$4.50 per share, value \$3,721.50; 3,376 shares common, valued at 5 cents per share, \$168.80.

California Federal Savings & Loan Association, 59 shares, full paid income shares, valued at \$100 per share, value \$5,900.

150 shares full paid income shares valued at \$100 per share, taken over subject to pledge agreement of Consolidated Investors, as per agreement in file 20, F .E. Jones, secured by hypothecation of the following shares of Investment Finance Company stock: Certificate No. 33, 5,000 shares, W. S. Brayton now Mary Starr Brayton; Certificate [389] No. 13, 2,500 shares, R. W. Starr; Certificate No. 25, 5,000 shares, A. R. Ireland; Certificate No. 21, 1,666 shares, J. H. Edgerton; Certificate No. 20, 1,200 shares, F. A. Anderson; Certificate No. 32, 1,160 shares, Ed. C. Thomas.

150 shares showing the value, \$15,015.00.'

Second deeds of trust, listing, but I will not read the names of each one of them, from 15

(Testimony of Clarence M. Bruce.)

deeds of trust being serial numbers 200 to 214, inclusive, and bearing the following values respectively:—Showing a total value for said 15 second deeds of trust of \$720.20. Possibly I had better read this, if the Court please, if counsel desires it. I don't have an aggregate total of the balance due.

The following second deeds of trust:

No. 200, Riggan, the balance as of December 28, 1936, \$82.45, value, \$10.54;

No. 201, Rictor, balance of December 28, 1936, \$487.92, value \$1.00;

No. 202, Troller McCulloch, balance December 28, 1936, \$323.31, value \$1.00;

No. 203, Adams, balance December 28, 1936, \$1,391.83 value \$250.00;

No. 204, Templin, balance December 28, 1936, \$833.32, value \$1.00;

No. 205, Pettit, balance December 28, 1936, \$1,147.54, value \$1.00;

No. 206, Cassano, balance December 28, 1936, \$404.85, value \$328.09;

No. 207, balance December 28, 1936, \$484.03, value \$1.00;

No. 208, Carly, balance December 28, 1936, \$450.00, value \$154.89; [390]

No. 209, Johnson, balance December 28, 1936, \$176.43, value \$1.00;

No. 210, Hoffman, balance December 28, 1936, \$750.00, value \$1.00;

(Testimony of Clarence M. Bruce.)

No. 211, Zlatin, balance December 28, 1936, \$797.08, value \$1.00;

No. 212, Liggitt, balance December 28, 1936, \$331.39, value \$66.68;

No. 213, Hamo, balance December 28, 1936, \$475.67, value \$1.00;

No. 214, Nielson, balance December 28, 1936, \$357.76, value \$1.00;

Showing the total value of \$36,000.00 for all assets; the minutes of such meeting being signed by R. W. Starr, Chairman, C. W. Twombly, Secretary.

Q. Have you, however, examined the records and documents produced here by the Witness Bundy Colwell, one of the officers of such corporations, which records and documents were heretofore received in evidence?

A. Yes, sir.

Mr. Adams: This goes to a different line of testimony, apparently, your Honor. I think it is a proper place to make the usual objection.

The Court: The same objection; the same ruling as to all defendants." [391]

The witness further testified: That the 2331 shares of A stock and 827 shares of B stock, and 3376 shares of C stock of the First Security Deposit Corporation, 209 shares of California Federal Building and Loan Association, and 15 Second Trust deeds referred to in the minutes of the Investment Finance Company are reflected in the

(Testimony of Clarence M. Bruce.)

books and records of the Investment Finance Company as having been received by it. That I examined the records of the Investment Finance Company to ascertain the consideration paid for such assets and they disclosed the Investment Finance Company paid the sum of \$36,000.00 therefore. These assets were taken onto the books of the Investment Finance Company at the values as set forth in the minutes just read. These assets were acquired by the Investment Finance Company on December 28th 1936. I have heretofore examined plaintiff's Exhibit 72, the invoices of Battelle-Dwyer. I examined the books of the Investment Finance Company as to the certificate numbers of such 2331 shares of A stock. I examined plaintiff's Exhibit 72, the invoices, for the purposes of ascertaining if they included any of the shares of A stock acquired by the Investment Finance Company from the Consolidated Investors.

"Q. Very well. Referring again, Mr. Bruce to plaintiff's Exhibit 72, namely, the invoices of the Battelle-Dwyer Company to R. F. D. Discount Corporation, will you state whether or not there are listed herein, upon such invoices, any of the shares of stock, of Class A stock, which was subsequently turned over by Consolidated Investors, the successors to R. F. D. Discount Corporation, to Investment Finance Company in this transaction?

A. Yes, there are.

(Testimony of Clarence M. Bruce.)

Q. How many of such shares appear upon these invoices set forth in plaintiff's Exhibit 72? [392]

A. 1,646 shares of the A stock of the First Security.

Q. How many shares of B stock, which subsequently were transferred in the conveyance of the assets of Consolidated Investors to Investment Finance Company?

A. 390.

Q. As to the 1,646 shares, I will ask you if you have totaled the price for such 1,646 shares of A stock as contained in plaintiff's exhibit 72.

A. Yes.

Q. What was that price?

Mr. Irwin: Pardon me, your Honor. I think I should interpose an objection at this time, as to that feature it is immaterial.

The Court: Your objection may be received as to all defendants; overruled; same ruling.

Mr. Lawson: May I suggest—

Mr. Irwin: Exception.

Mr. Lawson: —there is another phase of this question. Frankly, I don't understand the purpose of it. The price that was paid in between these two companies is immaterial so far as I can see, and I object to it on that ground, as not within the issues of this case, and not tending to establish any issue or any fact.

(Testimony of Clarence M. Bruce.)

Mr. Campbell: I will connect that up, your Honor.

The Court: I can see where they are going, I think, and on the promise to connect it up, I will overrule the objection subject to a motion to strike if the obligation isn't fulfilled on behalf of the plaintiff. I think the point is good at the present state of the record. They say they will connect it up, and we will give them the opportunity.

Mr. Lawson: Exception.

The Witness: \$1,327.68." [393]

The witness further testified: The records of the Investment Finance Company disclosed that it paid \$7,407.00 to Consolidated Investors for such 1,646 shares.

"Q. With reference to the B stock, to which you have referred, some 390 shares of the 827 shares sold to the Investment Finance Company, did you compute from plaintiff's Exhibit 72 the price paid therefor by the R. F. D. Discount Company or its successor, the Consolidated Investors? A. Yes.

Mr. Lawson: Same objection, your Honor.

The Court: Yes. The same objection to all this line."

The witness further testified: that the price paid for such 390 shares was \$345.00. The records of the Investment Finance Company disclosed that

(Testimony of Clarence M. Bruce.)

it paid for such 390 shares \$1,755.00. The Investment Finance Company paid to the Consolidated Investors, the successors of the R. F. D. Discount Company, Inc., \$20,900.00 for such 209 shares of California Federal Building and Loan Association stock.

“Mr. Campbell: At this time I wish to read from the minutes of the First Security Deposit Corporation for June 22, 1934, which is a portion of Plaintiff’s Exhibit 18.

‘Minutes of the special meeting of the Board of Directors of the First Security Deposit Corporation, June 22, 1934.

The following directors were present:
Messrs. R. W. Starr,

E. C. Thomas,

C. E. Berry,

A. R. Ireland, [394]

C. E. Perkins.

Absent:

Mr. W. S. Brayton

Mr. William Leffert.

In addition to the directors,
Mr. J. Howard Edgerton, legal
counsel, was present.’

Reading in part—

Mr. Adams: I don’t know what this is going to refer to. May this be read subject to the same objection made heretofore that it was prior?

(Testimony of Clarence M. Bruce.)

The Court: Same objection; same ruling.

Mr. Campbell: 'On motion of Mr. Berry, seconded by Mr. Ireland, the following resolution was unanimously adopted:

Resolved, that whereas an offer has been made to this corporation by the R. F. D. Discount Company, a corporation, to exchange \$20,300 of the preferred stock, Classes A and B of this corporation, at dollar for dollar par value in return for \$20,300 guarantee capital stock of the Railway Mutual Building and Loan Association, now owned by this corporation; and

Whereas, after investigation by the officers of this corporation, it appears that there is no present market value for the guarantee capital stock of the Railway Mutual Building and Loan Association and it would be to the benefit of this corporation to purchase its own preferred stock, using guarantee capital stock of the Railway Mutual Building and Loan Association as a consideration therefor;

Now, therefore, be it resolved, that the [395] Secretary of this corporation is hereby authorized to purchase \$20,300 of the preferred stock of this corporation, either Class A or B, using the Railway Mutual Building and Loan Association guarantee capital stock as a consideration for the purchase.'

(Testimony of Clarence M. Bruce.)

The minutes are signed by Dr. R. W. Starr, Chairman.

I will read further matter with reference to this:

'A discussion was held with reference to the above resolution, at which time Mr. Edgerton, legal counsel, pointed out to the Board of Directors that the latest financial statement of the company's auditors indicated a total surplus of \$27,681.67; that it was the opinion of counsel, as well as the company auditors, that the company could legally purchase its preferred stock with any portion of said surplus it so desired.

It was further the opinion of counsel that there being no present market value for the Railway Mutual Building and Loan Corporation guarantee capital stock, the company would be benefited in retiring as much of its preferred stock as possible by the above method.'

Such minutes being signed, 'Dr. R. W. Starr, Chairman; C. E. Perkins, Secretary.' "

The witness further testified: That the records of the First Security Deposit Corporation disclosed that on August 31, 1934, the 203 shares of the guarantee capital stock of the Railway Mutual Building and Loan Association were exchanged with the R.F.D. Discount Corporation for 750 shares

(Testimony of Clarence M. Bruce.)

of the preferred A stock of the First Security, and 265 shares of the preferred B, totalling 1,015 shares. [396]

"Q. I did not ask you, Mr. Bruce, but I will ask you at this time, was such transaction which you have described, that is to say, where the 203 shares of the Guaranty stock of the Railway Mutual Building and Loan Association was exchanged for 1,015 shares of A and B stock of the First Security Corporation had with the R. F. D. Discount Corporation? That is to say, was the transaction between the First Security Deposit Corporation and the R. F. D. Discount Company?

A. Yes, sir."

The witness further testified: I examined plaintiff's Exhibit 72 for the purpose of ascertaining whether or not there were contained in the invoices therein, any of the shares of A and B preferred stock, which was subsequently traded by the R. F. D. Discount Corporation to the First Security Deposit Corporation, and my examination disclosed that 467 shares of the A preferred stock were purchased by R. F. D. from Battlle-Dwyer and that 40 shares of the B stock had so been purchased, or a total of 507 of the total 1015 subsequently traded. My examination of Exhibit 72 disclosed \$23.45 was paid for the 467 shares of A stock.

"Q. And at what rate per share?

(Testimony of Clarence M. Bruce.)

A. That would be 5 cents for 465 shares and two of the A shares at 10 cents.

Q. And what price was paid for the 40 shares of B stock which were used in such transaction?

A. 5 cents per share, totaling \$2.00."

The witness further testified: That he was unable to ascertain from any of the records where the remaining 508 shares were obtained, or what price was paid therefor. That he was able to ascertain from an examination of the books and records of the First [397] Security Deposit Corporation, and of the Investment Finance Company that 203 shares of guaranteed capital stock of this transaction were the same 203 shares subsequently acquired by the Investment Finance Company for \$20,300.00. The trust deeds acquired by the Investment Finance Company in the final transaction were second trust deeds. I have examined plaintiff's Exhibit 44 of the stock certificate book of the Investment Finance Company to ascertain the original issuance of stock in that corporation; the books reflected such original issuance of stock as follows: 1,000 shares issued to First Security Deposit Corporation; 10 shares to E. C. Thomas; 10 shares to Smale; 10 shares to F. A. Anderson; 10 shares to C. W. Twombly; 100 shares to Mr. Ireland; 10 shares to W. A. Leffert; 10 shares to C. E. Berry; 10 shares to R. W. Starr; and 10 shares to J. Howard Edgerton. The Investment

(Testimony of Clarence M. Bruce.)

Finance Company was incorporated on August 30, 1935.

The witness further testified: That as of August 18, 1937, and thereafter until the dissolution of the corporation, there was outstanding 31,398 shares of the Investment Finance Company. I examined the records as of August 18, 1937, to ascertain whether or not any of the defendants were holders of shares of Investment Finance Company; as of August 18th J. Howard Edgerton—2,109 shares; R. W. Starr—8,422 shares; E. C. Thomas—1,410 shares; Joseph Smale—2,690 shares; A. R. Ireland—6,900 shares; C. W. Twombly—260 shares. The total of these shares is 21,691.

The witness further testified: That he had examined the books and records of the Investment Finance Company for the purpose of ascertaining the funds or property borrowed by it from the First Security Deposit Corporation; and to ascertain the amounts borrowed each month as well as the nature and character of any repayments, and the amount. I have examined such records for the period from organization of the Investment Finance Company to its dissolution in August of 1940. [398]

“Q. Now, will you state, Mr. Bruce, what your examination of the records disclose as to the amount of cash and other property borrowed by the Investment Finance Company from the First Security Deposit Corporation, the amount repaid on account of principal,

(Testimony of Clarence M. Bruce.)

whether in cash or other form of credit, each month, and the balance due, if any, between such corporations at the end of each month?

Mr. Irwin: Your Honor, may I interpose the objection that that is compound, cash or other. In other words, I ask counsel to re-frame it.

Mr. Adams: May I make the regulation objection, your Honor, as this again is another line of testimony. And then may I make the request of the Court that when we pass the point in 1938 as indicated on the chart, I believe 11-21-38, that the jury be again instructed that the loans or repayments and dissolution and all that after that date in '38 are not to be held to bind the defendant Twombly.

The Court: Well, we will have to make that objection at the time it comes up, because I am liable to forget it.

Mr. Adams: However, I will interpose this objection now that we formerly had as to the matter not being material and being hearsay, in competent.

Mr. Butler: I object to all of the testimony on behalf of the defendant Cronk on the ground that it is hearsay.

The Court: The objections will be overruled and the same exception.

Mr. Lawson: Your Honor, may I object on these grounds: There is no objection, of course, to the amounts that were loaned to

(Testimony of Clarence M. Bruce.)

the Investment Finance Company. That is [399] directly within the issues raised by the indictment. But there it stops. It is limited to that. And anything other than that we object to on the grounds it is not within the issues in this case.

The Court: Objection overruled and exception allowed. As to all defendants." [400]

"A. 1935, October, cash borrowed by Investment from First Security, \$20,500, repaid none, balance due, \$20,500.00;

November, cash borrowed from First Security by Investment Finance, \$18,000.00, repaid none, balance due, \$38,500.00;

December, cash borrowed from First Security by Investment Finance, \$17,253.26, repaid none, balance due, \$55,753.26.

Q. I will stop you at that point, and as you come to the end of each year will you recapitulate the total amount of borrowing for the calendar year, and the total amount repaid within each year, as well as stating the balance due at the end of each year?

A. Total for 1935 borrowed, \$55,753.26, repaid none, leaving the balance of \$55,753.26.

1936, January, cash borrowed by Investment Finance, from First Security, \$10,000.00. repaid nothing, balance due \$65,753.26;

February, cash borrowed from First Security, \$3,000.00, cash repaid to First Security

(Testimony of Clarence M. Bruce.)

by Investment Finance, \$3,500.00, balance due \$65,253.26;

March, cash borrowed from First Security, \$2,500.00; repaid none, balance due \$67,753.26;

April, cash borrowed from First Security, \$19,200.00, cash repaid, nothing, balance due, \$86,953.26;

May, cash borrowed from First Security, \$9,700.00, securities of the Railway Building and Loan Association, borrowed from First Security, book value, \$4,440.26; repaid nothing, balance due \$101,093.52;

June, cash borrowed from First Security, \$17,000.00; repaid nothing, balance due, \$118,-093.52; [401]

July, cash borrowed, \$10,000.00, repaid nothing, balance due \$128,093.52;

August, cash borrowed, \$11,500.00, cash repaid to First Security on account, \$5,000.00; balance due \$134,593.52;

September, cash borrowed, \$7,000.00, repaid nothing, balance due, \$141,593.52;

October, cash borrowed, \$23,986.11, Homeowners Corporation bonds borrowed, book value, \$16,530.56, repaid nothing, balance due \$182,110.19;

November, cash borrowed, \$9,500.00, repaid nothing, balance due \$191,610.19;

December, cash borrowed, \$8,000.00, repaid nothing, balance due, \$199,610.19.

Recapitulation for the year. Total borrowed

(Testimony of Clarenée M. Bruce.)

in cash and other assets are \$152,356.93. Total repaid cash \$8,500.00, balance due \$199,610.19.

1937, January. Cash borrowed, \$11,500.00, repaid nothing, balance due \$211,110.19.

February, nothing borrowed, nothing repaid, same balance.

March, \$11,500.00, cash borrowed, repaid nothing, balance due \$222,610.19.

April, cash borrowed, \$5500.00, repaid nothing, balance due \$228,110.19.

May, 1937. Cash borrowed, \$5,200.00, repaid on account collateral trust bond of the First Security, having a paid principal amount of \$4,500.00, balance due \$228,810.19. Credit was given for the full amount of \$4,500.

Q. In such payments in the future, where bonds or other assets are received and credit given, will you so state the manner in which it was given? [402] That is to say whether it was at full face value or less than face value.

A. June. Cash borrowed \$17,500; repayments with First Security collateral trust bonds, having a face value of \$13,440.40, credit for which was given at the exact face value.

One automobile transferred to First Security to apply on the account at a value of \$850.00; leaving a balance due of \$232,059.79.

July. Cash borrowed, \$8,000; repaid none; balance due, \$240,059.79.

August. Cash borrowed, \$11,500; one first

(Testimony of Clarence M. Bruce.)

trust deed borrowed from First Security on this account, book value, \$1,689.20; repayments with trust bonds of the First Security, plus accrued interest, totaling \$6,364.92; credit for which was given the full face value plus the accrued interest; balance due \$246,884.07.

September. Cash borrowed, \$1500; automobile from First Security, \$297.00; repaid nothing; balance due \$248,681.07.

October. Cash borrowed, \$7,000; repaid with collateral trust bonds \$174.06, which is the face principal amount, plus accrued interest, for which full credit was given; balance due, \$255,-507.01.

November. Cash borrowed, \$4,000; repaid with collateral trust bonds, \$7,812.62, which is the face principal amount, plus accrued interest, for which full credit was given; balance due, \$252,694.39.

December. Cash borrowed, \$7,000; repaid cash \$150; repaid collateral trust bonds, \$13,-838.88, which was the face principal amount plus accrued interest for which full credit was given, leaving a balance due of \$244,705.51.

Recap for the year: Total cash or other assets borrowed, [403] \$92,186.20; total repayment with cash, trust bonds, or other assets, \$47,090.88; leaving a balance due at the end of the year of \$244,705.51.” [404]

The witness further testified: I have examined the checks, plaintiff's Exhibits 55 to 70, issued by

(Testimony of Clarence M. Bruce.)

the Consolidated Investors to its stockholders in distribution of their shares in the dissolution of that corporation. The total amount paid by Consolidated Investors as shown by those checks to the defendant, R. W. Starr was \$8,172.08. The witness' attention was directed to the endorsement on said checks to the Investment Finance Company, and testified, that he examined the books of that Company to ascertain if shares of stock were thereafter issued to the defendant Starr, and ascertained that 8172 shares of stock at the price of \$1.00 each was issued to the defendant Starr; that the shares issued to him were on or about the dates of the checks which have heretofore been placed in evidence. That the defendant Smale received a check of \$3,240.55 from Consolidated Investors and at or about the date of the issuance of such checks, the defendant Smale purchased and received from the Investment Finance Company, as shown by its records, that Company's shares of stock in the amount of 2,440 shares at \$1.00 each. That his examination disclosed that the defendant Ireland upon the dissolution of the Consolidated Investors and its purchase by the Investment Finance Company, received from the Consolidated Investors \$8,427.89; that \$6,450.00 of this amount was paid over to the Investment Finance Company, for which the Investment Finance Company issued 6,450 shares of its stock. That the defendant Thomas received upon the dissolution of the Consolidated Investors \$1,160.93 and paid over to the Invest-

(Testimony of Clarence M. Bruce.)

ment Finance Company \$1,160 and received 1,160 shares of Investment Finance Company stock. That the defendant Edgerton received in the dissolution of the Consolidated Investors, the sum of \$1,859.72; that of this amount, there was paid over to the Investment Finance Company \$1,859.00 in exchange for 1,859 shares of Investment Finance Company stock. That all of such transactions were had at or about the time that is shown by the cancellation date or pricing date of those checks. [405]

The witness further testified: that the balance due from the Investment Finance Company to the First Security Deposit Corporation as of December 31, 1937, was carried upon the books of those companies as an open account; that an examination of the books and records of the two companies disclosed no securities given from the Investment Finance Company to the First Security Deposit to secure such loans. The rate of interest set up for such loans was 3%. The records indicated that they paid 3% interest for First Security owner's loans. The First Security received a periodic payment of that amount actually in cash or other assets.

"By Mr. Campbell:

Q. Now, will you proceed to the year 1938?

A. Before I proceed may I correct the figure I have for the balance of the year November 1937? I misread it. The correct figure is \$251,694.38 and not \$252,694.39.

(Testimony of Clarence M. Bruce.)

January, 1938, cash borrowed, \$2,400; cash repaid, \$297; balance due \$246,808.51.

February, cash borrowed \$2,000; repaid with First Security collateral trust bonds, \$3,772.28, which is the straight principal amount plus accrued interest for which full credit was given; balance due, \$245,026.23.

March, cash borrowed \$6,000; repaid, nothing; balance due \$251,026.23.

April, cash borrowed \$6,000; repaid with collateral trust bonds of First Security, \$14,683.22, which included the face principal amount plus accrued interest for which full credit was given; cash repaid that month \$2,300; balance due, \$240,053.01.

May, cash borrowed, \$7,100; repaid, nothing; balance due, \$247,153.01. [406]

June, cash borrowed, \$7,000; repaid, nothing; balance due, \$254,153.01.

July, cash borrowed, \$5,000; First Trust Deed transferred to First Security to apply on debt, book value \$1,871.53; balance due, \$257.281.48.

August, cash borrowed, \$12,000; repaid with collateral trust bond of First Security, \$16,027.55, which bond includes the face principal amount plus accrued interest, for which full credit was given; balance due, \$253,253.93.

September, cash borrowed, nothing; repaid with collateral trust bond of First Security, \$12,890.12, which is the face principal amount

(Testimony of Clarence M. Bruce.)

plus accrued interest for which full credit was given; balance due, \$240,363.81.

October, cash borrowed, \$21,500; repaid, nothing; balance due, \$261,863.81.

November, cash borrowed, \$6,250; repaid with collateral trust bond of First Security, \$115.60, which was the face principal amount plus accrued interest for which full credit was given; balance due, \$267,998.21.

December, cash borrowed, nothing; repaid with collateral trust bonds of First Security, \$156.11, which was the face principal amount plus accrued interest for which full credit was given; balance due, \$267,842.10.

A recapitulation for the year, cash borrowed, \$75,250; repaid with cash trust bonds and other assets, \$52,113.41, leaving a balance due of \$267,842.10.

1939, January: Cash borrowed, \$6,000; repaid with collateral trust bonds of the First Security, \$169.32, which was the face principal amount plus accrued [407] interest for which full credit was given, leaving a balance due of \$273,672.78.

February, cash borrowed, \$5,000; repaid with collateral trust bonds of the First Security, \$226.86, which was the principal amount plus accrued interest, for which full credit was given; cash adjustment, a payment of 10c, leaving a balance due of \$278,445.82.

March, cash borrowed; nothing; repaid,

(Testimony of Clarence M. Bruce.)

collateral trust bonds of the First Security, \$1,349.26, which was the principal amount plus accrued interest for which full credit was given; balance due, \$277,096.56.

April, cash borrowed, \$7,000; repaid with collateral trust bonds of the First Security, \$74,591.88, which was the principal face amount plus accrued interest for which full credit was given; balance due, \$209,504.68."

The witness further testified: That in May, 1939, the account was changed from an open account to a notes payable account; and that from that point demand notes were given by the Investment Finance Company to the First Security Deposit Corporation covering the amounts borrowed and the interest rate was changed from 3 to 6% on the notes; that at all times prior to May, 1939, the rate of interest of 3% was paid and received, and from and after May, 1939, until the dissolution of the Investment Finance Company the rate of interest was 6%; that a corresponding notes receivable account was opened up in the books of the First Security.

"Mr. Campbell: Proceed with May.

The Witness: Yes, sir, that is correct.

May, 1939, cash borrowed \$8,000; repaid with collateral trust bonds of the First Security, \$6,074.72, which was the principal amount plus accrued interest [408] for which full credit was given; repaid cash, \$2,600, leaving a balance due of \$208,829.96.

(Testimony of Clarence M. Bruce.)

June, cash borrowed, \$7,000; repaid with First Security collateral trust bond, \$1,039.87, which was the principal amount plus accrued interest for which full credit was given, leaving a balance due of \$214,790.09.

July, real estate transferred from First Security to Investment on notes, \$15,000; repaid with collateral trust bonds of the First Security, \$522.50, which was the principal amount plus accrued interest for which full credit was given; cash repaid, \$5,700, leaving a balance due of \$223,567.59.

August, cash borrowed, nothing; cash repaid \$500; leaving a balance due of \$223,067.59.

September, cash borrowed, \$500; repaid, nothing; balance due \$223,567.59.

October, cash borrowed, \$3,500; repaid with collateral trust bonds of the First Security, \$1.79, which was the principal amount plus accrued interest for which full credit was given, leaving a balance due of \$227,065.80.

November, real estate transferred from First Security Deposit on notes, \$12,900; repaid, nothing; balance due, \$239,965.80.

December. Nothing borrowed; nothing repaid.

Recapitulation for the year: Cash or other assets Acquired on notes and open account up to May 1, \$64.900; repaid with cash or trust bonds, \$92,776.30."

(Testimony of Clarence M. Bruce.)

The witness further testified: That further loans were made during the year 1940, for the months of January and March. They amounted to \$10,000 in January and \$500 in March; that no repayments were made in either month. That the then balance due was \$250,465.80. [409]

The witness further testified: That the total amount of cash or other assets borrowed by the Investment Finance Company from the First Security Corporation amounted to \$450,946.39, and that the total amount of credits received in repayment by cash and other items from the Investment Finance Company by the First Security Deposit Corporation amounted to \$200,480.59, leaving a balance due of \$250,465.80.

“Mr. Campbell: With reference to the payment of interest from the Investment Finance Company to the First Security Deposit Corporation, will you state the dates and amount of interest paid from the Investment Finance Company to the First Security Deposit, and the manner in which paid?

A. December 31, 1936, cash in the amount of \$3,660.36.

By Mr. Campbell:

Q. Your previous testimony was only as to principal repayments, was it not?

A. Yes, sir.

Q. And interest was kept up at all times, was it not?

A. Yes, sir, as far as I know.

(Testimony of Clarence M. Bruce.)

Q. Yes.

A. December 31, 1937, trust bonds in the amount of \$6,978.90, which would be the face amount plus accrued interest with the full values given. December 31, 1938. Collateral trust bonds of the First Security in the amount of \$7,513.94, which was the principal amount plus accrued interest for which full credit was given.

April 30, 1939,, collateral trust bonds of the First Security in the amount of \$2,753.71, which was the principal amount plus accrued interest for which full credit was given.

May 1939, cash in the amount of \$2.16. [410]

July 1939, cash in the amount of \$29.61.

December 1939, cash in the amount of \$8,854.39. The total interest payments by cash or other credits amounted to \$29,793.07."

The witness further testified: That the Railway Federal Building and Loan Association securities in the sum of \$4,440.26 borrowed by the Investment Finance Company from the First Security Deposit Corporation were disposed of on October 17, 1936, by the Investment Finance Company for \$4,983.33; that the profit derived therefrom was \$543.07. The records of the Investment Finance Company shows a disposition of Home Owner's Loan corporation bonds of the same day they were acquired in October, 1936, from the First Security Deposit ; that they were made part of a loan at their face value, book value of \$16,530.56, to a third party. I ascertained

(Testimony of Clarence M. Bruce.)

what disposition was made by the Investment Finance Company of the first trust deed, book amount of \$1,689.20, (August, 1937). It was returned to First Security on July 11, 1938, for the figure of \$1,871.53. The car I referred to in September, 1937, which was conveyed by the First Security to the Investment Finance Company, was sold by the Investment Finance Company for \$297.00. I referred to real estate in July, 1939, in the sum of \$15,000 as being conveyed from the First Security to the Investment Finance; this was sold during July of 1939 to A. R. Ireland for \$7,000. I referred to real estate acquired in November of 1939 by the Investment Finance Company, having a book value of \$12,900; that asset was disposed of in the same month to the American Building and Investment Company for \$3,000. The Investment Finance Company was a stockholder in the American Building and Investment Company as of the month of November, 1939, as disclosed by the records of the Investment Finance Company.

The witness further testified: That the particular assets named, Railway Mutual Building and Loan shares, certain [411] bonds of the H. O. L. C., and automobile, were taken from First Security to Investment in just those figures; these figures were reflected on the books of both corporations.

"By Mr. Campbell:

Q. Mr. Bruce, at the termination of the session yesterday you had just finished testifying concerning the lending of cash and securi-

(Testimony of Clarence M. Bruce.)

ties and other property from the First Security Deposit Corporation to the Investment Finance Company, and you had stated what the books showed as to the disposition of assets other than cash received by the Investment Finance Company from the First Security Deposit Corporation. Now, aside from the two items referred to yesterday, that is to say, the real estate acquired at \$15,000 which was conveyed to the Defendant Ireland for the sum of \$7,000, and the real estate acquired for the sum of \$12,900 and which was conveyed to the American Building and Investment Company, a company in which the Investment Finance Company had a stock interest for \$3,000, were any of the assets other than cash received by the Investment Finance Company from the First Security Deposit Corporation disposed of at a loss to the Investment Finance Company?

A. No, sir."

The witness further testified: That he has examined the stock record of the Investment Finance Company (Plaintiff's Exhibit 44); that he has ascertained therefrom the date and number of shares issued by the Investment Finance Company.

"Q. Will you state, Mr. Bruce, from your examination of that record, the certificates of stock issued in the Investment Finance Company, giving the certificate number, the date issued, and stating to whom such certificate was issued? [412]

(Testimony of Clarence M. Bruce.)

A. On October 5, 1935, Certificate No. 1, issued for 1,000 shares to First Security Deposit Corporation.

On the same date, Certificate No. 2 issued for 10 shares to C. W. Twombly.

Same date, Certificate No. 3 was issued for 10 shares to R. W. Starr.

Same date, Certificate No. 4 was issued for 10 shares to J. Howard Edgerton.

On October 8, 1935, Certificate No. 5 was issued for 10 shares to A. R. Ireland.

On June 17, 1936, Certificate No. 6 was issued to E. C. Thomas for 10 shares.

On July 3, 1936, Certificate No. 7 was issued for 10 shares to J. L. Smale.

Same date, Certificate No. 8 was issued for 10 shares to Florence Anderson.

On July 6, 1936 Certificate No. 9 was issued for 10 shares to C. W. Twombly.

July 9, 1936, Certificate No. 10 was issued for 90 shares to A. R. Ireland.

On July 15, 1936, Certificate No. 11 was issued for 10 shares to William Leffert.

Same date, Certificate No. 12, issued for 10 shares to C. E. Berry.

December 29, 1936, Certificate No. 13, issued to R. W. Starr, 2500 shares.

Same date, Certificate No. 14, issued for 4,800 shares to R. W. Starr.

December 30, 1936, Certificate No. 15 for 240 shares issued to C. W. Twombly.

(Testimony of Clarence M. Bruce.)

Same date, Certificate No. 16, 250 shares issued to A. R. Ireland. [413]

Same date, Certificate No. 17, 240 shares issued E. C. Thomas.

December 31, 1936, Certificate No. 18, 240 shares issued to J. Howard Edgerton.

January 11, 1937, Certificate No. 19 for 240 shares issued to R. W. Starr.

January 15, 1937, Certificate No. 20, issued for 1200 shares to Florence Anderson.

Same date, Certificate No. 21 issued for 1,666 shares, J. Howard Edgerton.

January 19, 1937, Certificate No. 22, issued for 2,095 shares to William Leffert.

Same date, Certificate No. 23, issued for 240 shares to J. L. Smale.

April 20, 1937, Certificate No. 24 issued for 5000 shares to W. S. Brayton.

On April 7, 1937, Certificate No. 25 issued for 5000 shares, A. R. Ireland.

On August 18, 1937, Certificate No. 26 issued for 1,450 shares, A. R. Ireland.

Same date, Certificate 27, issued for 139 shares to Florence Anderson.

Same date, Certificate No. 28, issued for 193 shares, J. Howard Edgerton.

Same date, Certificate 29 for 243 shares, issued to William Leffert.

On August 30th—no, August 18, '37, Certificate No. 30 issued for 2,440 shares to J. L. Smale.

(Testimony of Clarence M. Bruce.)

On August 18, 1937, Certificate No. 31 for 872 shares issued to R. W. Starr.

On the same date, Certificate No. 32 for 1,160 shares issued to E. C. Thomas.]414]

On December 21, 1937, Certificate No. 33 for 5,000 shares to Mary Starr Brayton. Oh, yes, that is correct. It was transferred from 24, from W. S. Brayton to Mary Starr Brayton.

Certificate No. 33 was cancelled on August 14th, 1939, and re-issued as Certificate No. 34, 2,500 shares, to Mary Starr Brayton, Certificate No. 35, 1,250 shares to R. W. Starr, and Certificate No. 36, 1,250 shares to Julia Starr Eckert."

The witness further testified: That as of August 31, 1940, the date of the dissolution of the Investment Finance Company, the stock outstanding was as follows:

"2500 shares in the name of Mary Starr Brayton; 1250 shares, Julia Starr Eckert; 1410 shares, E. C. Thomas; 2690 shares J. L. Smale; 1,349 shares Florence Anderson; 260 shares C. W. Twombly; 6800 shares A. R. Ireland; 2348 shares William Leffert; 10 shares C. E. Berry; 9672 shares R. W. Starr; 2109 shares J. Howard Edgerton, totalling 31,398. And 1000 shares standing in the name of First Security Deposit Corporation."

"Mr. Campbell: I wish to read from the minutes of the First Security Deposit Corporation, plaintiff's Exhibit 18.

(Testimony of Clarence M. Bruce.)

"The regular meeting of the Board of Directors of the First Security Deposit Corporation, May 20, 1936.

The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

A. R. Ireland

William Leffert

W. S. Brayton

C. E. Berry [415]

C. W. Twombly

In addition to the directors, Mr. J. L. Smale and Mr. J. Howard Edgerton were present.'

Reading in part—

'On motion of Mr. Thomas, seconded by Mr. Leffert, and carried, it was resolved that Mr. Twombly, or in his absence, Dr. Starr, vote the stock owned by this corporation in the Investment Finance Company until such authority be revoked.'

The minutes are signed by R. W. Starr, Chairman, and C. W. Twombly, Secretary."

The witness further testified: I have examined the records of the Investment Finance Company for the purpose of ascertaining the amount of all bonds turned over from the Investment Finance Company to the First Security Deposit Corporation. I have examined the books and records of the

(Testimony of Clarence M. Bruce.)

First Security for the purpose of ascertaining the reception of such bonds by the First Security; I have also ascertained therefrom the amount of credit given to the Investment Finance Company for such bonds. Bonds were turned over from the Investment Finance Company to the First Security Deposit Corporation for other purposes than payment of the principal and interest of the obligation existing between the two companies. I ascertained whether or not bonds were turned over from the Investment Finance to the First Security for the purchase of trust deeds. The books and records of the Investment Finance Company reflected the acquisition of real estate from the First Security; the books reflected a total of nine parcels which includes the two that were previously testified to; the seven other pieces were acquired by the Finance Company from the First Security between June 1936 and January 1937. The total book value of this real estate as reflected by the books of the First [416] Security Deposit Corporation was \$20,925.90. The consideration paid by the Investment Finance Company to the First Security were collateral trust bonds of the First Security, having a face value in the principal amount of \$21,511.38. Credit was given for such bonds in that face principal amount upon the books of the First Security Deposit Corporation. The books of the Investment Finance reflected the disposition of such real property. This real estate acquired by the Investment Finance was set up upon its book at the cost of the collateral

(Testimony of Clarence M. Bruce.)

trust bonds traded for the real estate. The net total received by the Investment Finance Company in the sale of these seven pieces of property, was \$21,051.50, and reflects a profit according to the books of \$7,223.87.

The witness was asked what the books reflected as to what the cost of such First Security Trust Bonds were to the Investment Finance Company, to which question an objection was made that the cost of the bonds to the Investment Finance Company was wholly immaterial, which objection was overruled and an exception noted; and the witness answered, \$13,827.63.

"Mr. Irwin: I think the point was raised at the outset, that it is understood that there is an objection as to hearsay, I believe on this. * * *

The Court: The objection may be considered to be made on behalf of all defendants to this question, and any future question with regard to these books that they are hearsay, the objection will be overruled; exception allowed; and subject to a motion to strike."

The witness further testified: That the books and records of the Investment Finance reflected the acquisition of the First Trust deeds from the First Security Deposit. Between the [417] dates of November 1, 1938, and April 24, 1939, the Investment Finance acquired 37 trust deeds according to their books, from First Security.

(Testimony of Clarence M. Bruce.)

“Mr. Campbell: At this time I wish to read from Plaintiff’s Exhibit 36, certain minutes of the Board of Directors of the First Security Deposit Corporation, reading from the regular meeting of the Board of Directors of the First Security Deposit Corporation of November 16, 1938:

‘The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

A. R. Ireland

C. W. Twombly

William Leffert.’

Reading in part: ‘Upon motion of Mr. Thomas, seconded by Mr. Twombly, and carried, the sale of 13 first trust deeds (as listed below) in the sum of \$13,407.62 to the Investment Finance Company for First Security Deposit Corporation collateral trust bonds and interest in the amount of \$13,409.09, the balance to be applied against accounts receivable, was approved: No. 1030, Algiers, No. 1035, Elliott; No. 2099, Foster; No. 2002, Hutton; No. 2005, Jackson, No. 2007, Maly; No. 2004, Moore; No. 2041, Olsen; No. 2001, Sandifur; No. 430, Stark; No. 2003, Swanston; No. 1034, Wixen; and No. 2008, Wright.’

Such minutes being signed ‘R. W. Starr,
Chairman.’

Reading from the regular meeting of the
Board of Directors of the First Security De-

(Testimony of Clarence M. Bruce.)

posit Corporation of December 21, 1938: [418]

'The following directors were present:

Messrs. R. W. Starr

A. R. Ireland

E. C. Thomas

William Leffert.

Absent:

Mr. C. W. Twombly.

In addition to the directors Mr. J. H. Edgerton and Miss Florence Long were present.'

Reading in part: 'On motion of Mr. Thomas, seconded by Mr. Leffert, and carried, the sale of six first trust deeds (as listed below) in sum of \$3,651.47 to the Investment Finance Company for First Security Deposit Corporation collateral trust bonds and interest in the amount of \$3,744, the balance to be applied against accounts receivable, was approved:

No. 82, Simmons; No. 617, David, and
No. 766, Citizens Securities Company.'

Minutes being signed by 'R. W. Starr,
Chairman.'

Reading from the minutes of the regular meeting of the board of directors of the First Security Deposit Corporation, meeting of February 15, 1939:

(Testimony of Clarence M. Bruce.)

"The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

A. R. Ireland

J. L. Smale

William Leffert.

In addition to the directors Mr. J. H. Edgerton and Miss Florence Long were present.' Reading in part:

Reading from the regular meeting of the board of directors of the First Security Deposit Corporation meeting of January 18, 1939:

"The following directors were present:

"Messrs. R. W. Starr

"A. R. Ireland

"E. C. Thomas

"William Leffert.

"In addition to the directors, Mr. J. H. Edgerton and Miss Florence Long were present." Reading in part: "On motion of Mr. Ireland, seconded by Mr. Leffert, and carried, the sale of three first trust deeds (as listed below) in the sum of \$3,-651.47 of the Investment Finance Company for First Security Deposit Corporation collateral trust bonds and interest in the amount of \$3,744, the balance to be applied against accounts receivable, was approved:

(Testimony of Clarence M. Bruce.)

“No. 82, Simmons; No. 617, Dovid, and
No. 768, Citizens Securities Company.”

Minutes being signed by “R. W. Starr,
Chairman.” [419]

‘On motion of Mr. Ireland, seconded by Dr. Starr, and carried, the sale of three first trust deeds (as listed below) in the sum of \$3,251.11 to the Investment Finance Company for first Security Deposit Corporation collateral trust bonds and interest in the amount of \$3,328, the balance to be applied against accounts receivable, was approved: No. 2015, Pritchard; No. 892, Johnson; and No. 624, Brown.’

Such minutes were signed by ‘J. L. Smale, Chairman.’

Regular meeting of the Board of Directors of the First Security Deposit Corporation, meeting of March 15, 1939:

‘The following directors were present:

Messrs. R. W. Starr

J. L. Smale

E. C. Thomas

A. R. Ireland

Willia Leffert

In addition to the directors, Mr. J. H. Edgerton and Miss Florence Long were present.’

Reading in part:

‘On motion of Mr. Ireland, seconded by

(Testimony of Clarence M. Bruce.)

Mr. Thomas, and carried, the sale of 10 first trust deeds as listed below in the sum of \$20,444.73 to the Investment Finance Company for First Security Corporation collateral trust bonds and interest in the amount of \$21,442.00, the balance to be applied against accounts receivable, was approved: No. 600, Bonang; No. 2031; Cugno; No. 2047, Elkridge; 203, Gott; 2040, Hefner; 2042, Johnson; 798, Nicholson; 2028, Wetterer; 2049, Longstreet; and 2048, Barbato.' [420]

The minutes being signed, 'J. R. Smale, Chairman.'

Minutes of regular meeting of Board of Directors of the First Security Deposit Corporation meeting of April 19, 1939:

'The following directors were present:

Messrs. R. W. Starr

J. L. Smale

E. C. Thomas

A. R. Ireland

William Leffert.

In addition to the directors, Mr. J. H. Edgerton and Miss Florence Long were present.' Reading in part:

'On motion of Mr. Leffert, seconded by Mr. Thomas, and carried, the sale of two first trust deeds as listed below in the sum of \$3,093.15 to the Investment Finance

(Testimony of Clarence M. Bruce.)

Company for First Security Deposit Corporation collateral trust bonds and interest in the amount of \$3,672, the balance to be applied against accounts receivable, was approved: No. 122, Boyd, No. 730, Croot.'

The minutes being signed 'J. L. Smale, Chairman.' [421]

The witness further testified: That the records of the Investment Finance Company reflected the acquisition of the Trust Deeds referred to in the minutes from the First Security Deposit. The books reflected a disposition of the Trust Deeds by the Investment Finance Company after their acquisition; two weeks was the longest any such trust deed was held by the Investment Finance Company; they were sold to the California Federal Savings and Loan Association.

"Q. And for what were they sold? That is to say, what was the consideration received?

Mr. Irwin: Pardon me, your Honor. I think this is another name, and I should interpose another objection at this time on the ground if immateriality and not within the issues.

The Court: Objection overruled. The objection is made on behalf of all of the defendants, and overruled, and exception allowed, and subject to a motion to strike if not properly connected up.

The Witness: Sold for cash."

(Testimony of Clarence M. Bruce.)

The witness further testified: That the face value of the trust deeds at the time of their acquisition as reflected by the books was \$54,181.50; that the consideration paid for the trust deeds by the Investment Finance Company were collateral bonds of the First Security; that the face amount of such collateral trust bonds plus accrued interest, was \$54,181.50. That the books of the Investment Finance Company reflected that its cost for such collateral trust bonds was \$38,699.20. That during the time the Investment Finance Company held such first trust deeds prior to their sale to the California Federal Savings and Loan Association, they received on account of such trust deeds \$147.30 to apply on the principal, in advance payments of interest \$18.15, making [422] a total of \$165.45. The amount of cash received by Investment Finance Company from California Federal Savings and Loan for such trust deeds was \$54,016.05. The books and records of the Investment Finance Company reflected a profit to the Investment Finance of \$15,482.30. The trust deeds were set up on the books of the Investment Finance Company at \$54,-181.50.

"The Court: And what do the books of the Investment Finance Company show as the cost of those bonds?

The Witness: \$38,699.20.

The Court: And the difference between that and the price at which they were taken over by First Security less the cash received in the

(Testimony of Clarence M. Bruce.)

meantime, was the item which was placed on the books of Investment Finance as the cost of the property and the difference was carried on profit and loss account; it that correct?

The Witness: Yes, sir, that is correct.

The Court: Now, gentlemen, may it be stipulated, as sometimes counsel quite naturally forgets to say, according to the books that all of the testimony of this witness, if that is the fact—and I shall ask him—he is testifying not as to his opinion but as the books show; is that correct?

The Witness: Yes, sir, that is correct.

The Court: May it be so stipulated, gentlemen?

Mr. Irwin: That we understand him to be so testifying, your Honor?

The Court: Yes, that you understand him to be so testifying."

The witness further testified: From an examination of the books of the Investment Finance Company, I ascertained the total amount of bonds turned over from the Investment Finance Company to the First Security Deposit and applied on the debt, [423] both principal and interest, existing between the two companies, and applied on the purchase of these trust deeds. The face amount of such bonds applied on the principal would be \$39,974.17; the face amount plus accrued interest would be \$46,090.88. The amount of bonds during

(Testimony of Clarence M. Bruce.)

the year 1937, both face amount and accrued interest turned in for credit on account of interest on the obligation during that year was \$6,978.90. The cost of the Investment Finance Company of all such bonds was \$33,012.31.

“Q. Referring to the year 1938, what was the face amount, plus accrued interest if credit was given for accrued interest, of bonds turned over from the Investment Finance Company to the First Security Deposit Corporation for credit on the principal of the debt?

A. \$47,644.88.”

The witness further testified: That the amount of bonds and accrued interest applied on interest on that debt was, \$7,513.94. That \$23,740.94 was the amount of bonds utilized in the purchase of trust deeds. The total of the face amount of bonds plus accrued interest applied on debt, interest and trust deeds amounted to \$49,684.13. The total face value plus accrued interest was \$78,899.76. The cost of the Investment Finance Company of such bonds was \$49,684.13.

The witness further testified: As to the year 1939, the total face and accrued interest of bonds turned over from the Investment Finance Company to the First Security and applied on the principal of the debt was \$83,976.20; the amount applied on interest \$2,753.71; the amount applied on trust deeds, \$30,440.56. That the face value plus aggregate interest of all such bonds was \$117,170.47, to which

(Testimony of Clarence M. Bruce.)

credit was given in that amount. That the cost of such bonds to the Investment Finance Company was \$79,440.80. The face value and accrued interest for which credit was given by [424] the First Security to the Investment Finance for these bonds for the three years amounted to \$249,140.01; the cost to the Investment Finance of all such bonds was \$162,-141.24, or a difference of \$86,998.77.

“By Mr. Campbell:

Q. Mr. Bruce, you have also testified concerning bonds which were turned over for real estate in the face amount of \$21,511.38; and you testified yesterday concerning bonds which were turned over at cost to Investment Finance Company?

A. Yes.

Q. Bearing those figures in mind as well, what was the total face amount of all bonds turned over from the Investment Finance Company to the First Security Deposit Corporation?

A. \$240,929.99. To that amount accrued interest was added to which credit was given to the Investment Finance of \$36,217.25. The total amount of credit given by First Security to the Investment Finance on account of such bonds and accrued interest was \$277,147.24. The cost of all such bonds to the Investment Finance was \$179,005.66. The difference between such cost and the total amount of credit given is \$94,682.52.”

The witness then stated that he desired to make a correction in his previous figure, and testified

(Testimony of Clarence M. Bruce.)

that concerning the total value of all bonds for which credit was given from the Investment Finance Company to the First Security, the figure should be \$273,688.18.

“Mr. Campbell: At this time, if the Court please, I am going to offer as to the Defendants Edgerton, Twombly, a document bearing date of January 3rd, 1936 and bearing the signatures, ‘Investment Finance Company, by [425] J. H. Edgerton, Vice-president, By C. W. Twombly, Secretary,’ and ‘Pierce Petroleum Corporation, by J. H. Edgerton, President, by C. W. Twombly, Secretary,’ which I am offering on the basis of the signatures and the materiality of the document as will appear to the Court from examination of the document as to these two defendants.

Mr. Adams: To which we object, your Honor, on the grounds formerly stated as to the materiality.

The Court: The objection will be overruled and exception allowed, subject to a motion to strike.”

Mr. Campbell: May I suggest that I take up some other matter during the time that we have and we can take that up later. At this time I wish to read from the minutes of the Investment Finance Company. I am reading from the minutes of the Board of Directors (plaintiff’s Exhibit 36) meeting of December 21, 1938.

'The following Directors were present:

R. W. Starr,
A. R. Ireland,
E. C. Thomas,
J. L. Smale,

Absent:

Mr. C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton and Miss Florence Long were present.'

Reading from such minutes in part:

'On motion of Mr. Smale, seconded by Mr. Thomas and carried, it was resolved that Mr. Twombly's resignation as director of this Corporation be accepted.

On motion of Mr. Thomas, seconded by Mr. Smale [426] and carried, it was resolved that Mr. H. Dean Campbell be employed to make an audit of the books of this Company.'

The minutes being signed, 'R. W. Starr, Chairman.'

Reading from the same Exhibit, the meeting of the Board of Directors of the Investment Finance Company of March 15, 1939:

Mr. Irwin: * * * * That is a matter I would like to make an objection to and it concerns an exhibit concerning which there is a motion to strike. * * * *."

(The jury retired from the Court Room.)

"The Court: Now, in connection with this letter of January 3rd, 1936, which is a letter between Investment Finance and Pierce Petroleum, as I understand it, you do not propose to connect that up with any of the other defendants?

Mr. Campbell: Not the letter itself, your Honor. I propose to show in that connection that the Defendants Edgerton and Twombly were the principal stockholders of the Pierce Petroleum Corporation as set forth in the minutes which I have offered there and which are signed by the two defendants, holding some 300 of the 405 outstanding shares of stock of that corporation.

We will undertake to show that large loans were made by the Investment Finance Company of funds which had in turn been received from the First Security Deposit Corporation to this Pierce Petroleum Corporation, which funds resulted in a loss of all but a very nominal amount as set forth on the books of Investment Finance Company. [427] That is the nature of the testimony.

Now, as to this latter subject to which I am now directing myself, I am proposing to read —first, I have read minutes showing the appointment of one H. Dean Campbell as auditor or to make an audit of the books of the Investment Finance Company. I am proposing to read at this time the minutes of the Invest-

ment Finance Company showing the receipt and discussion of such report by the Board of Directors. Thereafter, I intend to read such Exhibit which has heretofore been placed in evidence as Plaintiff's Exhibit 46, which was the report referred to and which has heretofore been identified by the witness Long as being a communication of this on or about February 25, 1939, to these Board of Directors of the situation relative to their companies and showing, if at no other time, showing on the part of all of them knowledge of their circumstances.

The Court: Let's go back first to this letter of January 3rd, which seems to be a little different.

Here is a letter signed by Investment Finance Company and addressed to Pierce Petroleum and consented to by Pierce, signed by Edgerton as vice-president of Investment, and Twombly as secretary, and consented by Edgerton as President of Pierce, and Twombly as secretary of Pierce.

I am a little at loss to understand the plaintiff's position. It proposes, as I understand it, that that will be introduced as binding upon Edgerton and Twombly, under all counts. Now, all of the substantive counts are predicated on a scheme to defraud and the use of the mails. The conspiracy count, we are all familiar with that.

Now, is this letter here of January 3rd supposed to be one of the items going to show the

existence of the [428] conspiracy, or is it going to show the carrying out of the conspiracy, or is it intended to show the scheme under the substantive counts? Just what is the purpose of it?

Mr. Compbell: Well, I might state, your Honor, that it is simply offered as one of the chain of circumstances by which the Government contends that these defendants, having diverted the assets, money and assets of the First Security Deposit Corporation into this Investment Finance Company, that they considered that money as their own and treated it as their own, making such investments in enterprises in which they were personally interested, and as illustrative of their intent in connection with those assets.

However, it was offered, as I state, as one of many circumstances from which the jury can infer and draw the approximate intent of these defendants in the use of this money.

In other words, the use to which the money was put after it was taken from the First Security Deposit Corporation is illustrative of the intent with which it was taken and it is in that connection that this particular Exhibit and subsequent Exhibits of a similar character will be offered.

Mr. Lawson: Your Honor, in that connection it would have been very easy for the Government to have alleged that in the indictment,

which they have not done. The completed offense is the advancing of money or property to the Investment Finance Company and there it stops. Now, it would have been very easy in the language stated here by Mr. Campbell, to have charged the defendants here with that, if that is the crime with which they intend to charge us. That is the point.

Secondly, the character of the evidence offered here [429] has no evidentiary value so far as the scheme as alleged in the indictment itself, and at most all that could be said of it is that it shows a collateral or side agreement between two of the defendants which doesn't affect the general scheme.

There may be other such instances throughout the course of the affairs of which we are talking here, but it doesn't address itself to the scheme as alleged in the indictment. It is an entirely different crime. And that is why I think that Mr. Campbell has been in error in his conception of the relationship of some of these things about which he has been talking to the main charge as continued in the indictment. At most it would be a scheme of a conspiracy within a conspiracy, as your Honor well knows, which cannot be produced against us under a charge of this character.

* * * * *

Mr. Campbell: The evidence, which is now offered is simply, you might say, a part of the res gestae in that it is showing the use to which

the money, which he had converted, was put; and is therefore offered on the intent with which he had converted the money of the First Security Deposit Corporation.

He is not here charged with converting the assets of the Investment Finance Company, nor are we raising any question, nor is there raised in the indictment any question as to the propriety as between himself and the Investment Finance Company, but it is offered as illustrative of the intent with which he had first converted under the terms of the indictment and the bill of particulars, converted assets to the Investment Finance Company for the purpose of using them to his own profit.

[430]

* * * * *

We feel that we are entitled to show that they, once having received the funds, that we shouldn't stop short there and say, 'Now, there is your case,' but that we have the right to go the step further and show that they were using those funds to their own individual use and profit.

The Court: * * * Now, so far as divers other ways are concerned, I think the position of counsel for Twombly is sound, that the Government is limited to those transactions insofar as proof against Twombly is concerned.

There is this one other element, however: The indictment says that the defendants under the pretense of loans did convert and divert to

their own use. I have no way of knowing whether this evidence is intended to come within the charge of the indictment of pretense of loans.

Mr. Campbell: May I state, your Honor, in that connection there were only three methods. I wish to be frank with the Court in this regard. There are only three methods by which property of the First Security Deposit Company was diverted away from it. There were the loans concerning which testimony has gone in, by the real estate transactions, and by the trust deeds, all of which have now been covered in the testimony.

It is not the claim of the Government, and it is not the fact that money was loaned from the First Security Deposit Corporation to the Pierce Petroleum. However, the proof and the facts now show that certain large sums of money of the First Security Deposit Corporation were loaned or transferred to the Investment Finance Company, a company in which the defendants had a large stock ownership.

The Court: * * * It is a question in my mind as to whether this may conceivably come

under the phase of the charge under the pre-tense of loans.

Mr. Campbell: I do not claim it does, your Honor.

The Court: You do not claim it does?

Mr. Campbell: No, sir, I do not.

The Court: I wanted to be sure of your position in that. * * * It may be that this is one element which the jury might be entitled to consider as against all of the defendants having to do with the scheme of the conspiracy; that I don't know because it hasn't been offered for that purpose, but I don't believe it is proper for the Government to limit itself in that way * * *.

Mr. Campbell: I will make my offer as to all defendants * * *.

The Court: Now, as I understand it, so far as this particular testimony is concerned, the offer now being made as against all of the defendants only on the matter of intent.

* * * * *

Mr. Irwin: (Makes Statement.)

The Court: Let me see if I understand this. A man down in Long Beach owed the Investment Finance Company a considerable amount of money which he had been borrowing for the financing of automobiles, and he was unable to pay the obligation to the Investment Finance Company, but he said to them, 'I have an oil well that [432] looks like a live prospect. I wish you would investigate and I will turn this

over to you at the right kind of a price in payment for some of my obligations to the Investment Finance Company.'

The Investment Finance Company made an investigation and determined that it might be a way of salvaging their account. So they put in Twombly and Edgerton on the Board of Directors of the Pierce Petroleum Company to operate it without Edgerton or Twombly having any individual interest in the Pierce Petroleum Company, and the interest that they represented was the interest of the Investment Finance Company.

Mr. Irwin: That is my understanding at the outset.

Mr. Lawson: I think in that connection, my understanding is that the stock was issued so as to retain control by Twombly and Edgerton until the deal had been worked out, whatever the amount was.

The Court: It was all money of the Investment Finance Company, or money of Edgerton and Twombly personally?

Mr. Lawson: Investment Finance Company, your Honor, I think was responsible for everything in connection with it.

* * * * *

Mr. Irwin: It was a producer, then they lost some of their tools and additional money was spent in a fishing job. They never got the job back and it watered up. I understand they sold it for salvage and somebody took it over.

Mr. Adams: May I interrupt you to suggest that you might add as part of that history that the Investment Finance Company then foreclosed. They had also taken a chattel mortgage on the rig and tools and they foreclosed that chattel mortgage and took back to themselves the [433] proceeds thereof to partially reimburse themselves for the loss sustained.

The Court: * * * Now, the offer has been made as to all defendants in connection only with the one element of the offense, as charged in the 16 counts of the indictment, namely, intent.

It has always been my understanding of the law that the specific items having to do with intent need not be alleged in the indictment and need not be set forth in the Bill of Particulars; if the Bill of Particulars is requested on that score, and if it was requested heretofore, it is denied.

It is my understanding of the law that you can't so limit the Government on the question of intent; that the Government may go so far and have been permitted in many instances to go as far as to prove other similar offenses, not for the purpose of showing that the defendant committed those particular offenses but for the purpose of showing intent. Therefore I rule out the objection that the items of intent must not be shown in the face of the indictment and the bill of particulars. * * *

If the Government wants to introduce that evidence, I think they have a right to, so long, as I explained to this jury, and I most certainly shall explain to them as soon as I get them back here, that this evidence which is presently pending before the Court is only going to show intent and is not evidence to show any of the other elements of either the substantive counts or the conspiracy count of the indictment. * * *

The matters having to do with Pierce Petroleum being now offered only to show intent, it is my view that they are clearly admissible under proper instructions to the [434] jury, and I so rule and exceptions will be allowed to defendants.

Mr. Irwin: * * * May I restate the objection?

The Court: Restate the objection. * * *

Mr. Irwin: I object, may it please the Court, to this offer of evidence with reference to the Pierce Petroleum, on the grounds that it is immaterial, incompetent, hearsay, not within any of the issues of the indictment and that in connection with the objection of incompetency, that no foundation has been shown with reference to the defendants Starr, Smale, and Thomas.

Might it be deemed, your Honor, that this objection is made in the presence of the jury before the evidence was in and that it need not be repeated to this entire line of testimony?

The Court: It may be so stipulated, gentlemen?

Mr. Campbell: So stipulated.

* * * * *

Mr. Adams: I wish to add, your Honor, the objection to these documents that he had had handed up, that there is no foundation laid for the introduction of the minutes book or of that other document that Mr. Campbell handed to counsel for examination. I don't know the number of that or whether it has a number. Has it a number, Mr. Campbell? That letter?

Mr. Campbell: The minutes book was given 84 for identification, but I am offering, however, only one of the minutes there and offering it on the basis of the signatures of the defendants Edgerton and Twombly and the same is true as to the other documents.

Mr. Adams: As to those documents that Mr. Campbell has now mentioned, I wish to add the further objection of no foundation. [435]

"The Court: The objection on the ground of lack of proper foundation for the admission of the minute book is sustained. The only witness who testified as to the books of the company testified as to her knowledge from the first of January, 1939, so that there is no foundation laid as yet prior to that time.

Mr. Campbell: If the Court please, in that connection, as I think I stated, and as it has heretofore been stipulated as to the signatures of these two defendants—

The Court (Interrupting): I am only ruling on the admissibility of those particular minutes prior to January 1, 1939.

Mr. Campbell: I am only offering one minute of this book, your Honor. I am not offering the entire book. I am offering only the minutes of the stockholders meeting of February 19, 1937, which minute is signed by the defendants Edgerton and Twombly, and I am offering it on the basis of the signatures of the defendants which have heretofore been stipulated to.

Mr. Adams: The stipulation, your Honor, that the signatures of the defendant only went to this extent as I took it, that if evidence was competent and proper and material and in all other respects properly introducible and introduced, that then the stipulation as to the signatures would apply. That was my intention and that is my understanding of the stipulation.

Mr. Lawson: I would like to get myself on record before it gets so far away.

Mr. Adams: If that is not the situation, I would like to withdraw any further stipulation that is to be taken advantage of to that extent, because I never lent it to that extent and I believe the record will bear me out. [436]

Mr. Lawson: I wish to adopt the objections of all counsel who have heretofore stated their objections and, of course, restricting the bill of particulars as made by Mr. Adams, and add the objection on behalf of the defendants Ed-

gerton and Ireland that it is an attempt to prove a conspiracy within a conspiracy, a scheme within a scheme, and not the scheme for the conspiracy as alleged in the indictment.

Further, that the evidence cannot be in the case of this type be received as to any particular defendants and excluded as to others, because the very nature of the offense is a joint offense.

And in this connection, your Honor, I wish to have clarified the position of the plaintiff in regard to its use of the term 'intent.' Mr. Campbell stated at one time in the course of his argument that it was to anticipate the defense of good faith. Now, I want to find out if that is a correct statement. I mean, did I understand counsel correctly to state that?

The Court: I don't think they should be required to do that other than to have rulings on interruptions.

What was your understanding of the stipulation as to the genuineness of the signatures of your clients?

Mr. Lawson: Wherever they appear I will stipulate those are the signatures of my clients.

The Court: Did you intend by that stipulation that any documents signed by them would be admitted in evidence as being genuine documents as they purport to be or only that those were the proper signatures and that outside proof had to be introduced as to the genuineness of the document?

Mr. Lawson: Well, the signature, of course, naturally, if it was the signature of the defendant, that it went to the extent of the document which was signed." [437]

The Court: My understanding of the stipulation, that where a document was signed and you are able to identify the signature, that you stipulated that that was an admissible and competent document subject, however, to your right to establish the fact that there was a forgery or that there was something wrong about the matter which you had a right to do as a part of your case.

Mr. Lawson: I don't stipulate it is competent evidence or admissible for the purpose of this case.

* * * * *

Mr. Lawson: I would like to get into the record also before the final ruling in regard to the purpose for this evidence as announced by Mr. Campbell which he has stated as for the purpose of showing intent, and I object further on the ground that it is not in any manner tending to establish specific intent, which is required, and that is the specific intent to violate the law in the manner as described in the indictment. In other words, the crime as charged, and that a mere state of mind has no place in a case of this kind; it is wholly immaterial; and further that in the event that counsel for the Government is unable to show by this evidence and what he may introduce to follow it up, un-

less he can show that the money or the property that he claims was diverted, found itself into the possession of either the defendants Edgerton and Ireland as alleged in the indictment, and that it will only establish probably lack of judgment or mistake of judgment or management, upon the theory of the Government to show that there was a diversion of funds or property as alleged in the indictment, that it is an error that can not be cured.

We believe that we would be entitled to a mistrial, [438] because I doubt very much, as I have urged before, your Honor, that the character of this evidence is such that it cannot be cured by any admonition of the Court.

Mr. Adams: May I speak about this stipulation, your Honor?

To stipulate that because the document has the signature of Mr. Twombly on it that it might go in, it simply waives my right to make the objections I have been making. In other words, I have been making, for instance, lack of foundation, some immateriality, some incompetency. There is no need of making those objections as to any documents that he has his name on, if by that stipulation I have robbed myself of all of the efficacy of all those objections. And I definitely want to say that as far as my recollection of this transcript is concerned, I have not made such a stipulation. * * *

But I am perfectly willing to stipulate that

if and when the Government has established the right to introduce evidence under the ruling of your Honor subject to the objections that may be made, that then after your Honor has ruled that that evidence is admissible, then I would be glad in each and every instance to stipulate to the signature of my client, but I am not going to go so stipulating now with all my right of objection.

Do I make myself clear at this time, your Honor?

The Court: Yes. You may call the jury.

Mr. Irwin: I would like to make a statement as to the auditor's Exhibit 46.

The Court: Yes. You may make your points with regard to that now while the jury is coming down. I went through all of this. I am very familiar with the comments.

Mr. Irwin: Very well. I move at this time, may it [439] please the Court, that the admission of that document 46 might be considered as having been stricken for the purpose of interposing this objection, that that portion of 46, which contains the comments of the auditor, Mr. Campbell, as distinguished from the audit, are opinions and conclusions, and cannot be binding on any of the defendants that I represent. It is a very serious question.

Mr. Lawson: I join in that motion on the grounds as stated.

The Court: I will rule on that later."

(The Jury returns and the following proceedings were had in their presence:)

"The Court: Now, the matters before the Court are the minutes of the stockholders' meeting of the Pierce Petroleum Corporation under date of February 19, 1937. That was just one, wasn't it?

Mr. Campbell: Yes.

The Court: Exhibit 84. And the letter dated January 3, 1936 passing between Pierce Petroleum Corporation and Investment Finance Company. The Court rules that both of these documents are admissible to show intent.

You may now ask for a stipulation as to signature.

Mr. Adams: We wish an exception to the ruling.

The Court: You may have the exception.

You may ask for Mr. Adams' stipulation as to the signatures.

Mr. Campbell: At this time I will ask if it may be stipulated.

Mr. Lawson: For the purpose of the record may we [440] have an exception?

The Court: Yes, it hasn't gone in. I will take care of that when the time comes. Give them numbers for identification now.

The Clerk: The letter will be plaintiff's Exhibit 180 and the minutes 181.

Mr. Campbell: Might it be stipulated that—

Mr. Adams: May I ask a question first?

Your Honor, in admitting these minutes, your Honor is admitting them over the objection of no foundation?

The Court: No. It was my understanding that these documents which were being shown, signed by any of the defendants, that they were to be admitted on the stipulation of the signature, and I have been following that policy.

You said that you would now, if you ever entered into such a stipulation, withdraw from it, and would insist upon the Court's first passing upon its materiality, and then you wanted it handed to you, and rather than require a handwriting expert to prove Twombly's signature, then you would then determine what you would do about it.

Now, I haven't admitted this in evidence. I have simply ruled it is material on the question of intent. I have asked counsel to submit it to you, and ask you whether you are willing to stipulate.

Mr. Adams: I don't understand you frankly. I am at a loss. I said to your Honor that if your Honor admitted it in evidence—now, your Honor just said you are not. I don't know whether it is admitted or whether it isn't. If it is admitted, then it must be admitted for some purpose.

What I am trying to point out, if your Honor overrules my objection of no foundation, if your Honor then overrules my objection of hearsay, if your Honor overrules my objection

of not being material, if your Honor then admits it in [441] evidence, then I will be glad to stipulate to the signature, but I want your Honor's ruling on the matter of foundation and the other points.

The Court: You are asking the impossible. How can I admit a thing in evidence when there is no foundation laid so far as the signature is concerned?

What you just stated you had said wasn't what you said at all. You said if I would rule it was material, rather than put the plaintiff to the trouble and expense of bringing in handwriting experts, that you would then determine whether you are going to yield and say that the signature of Mr. Twombly was genuine.

Mr. Adams: I felt, your Honor, this way, as your Honor well said to me the other day, foundation for a document may be laid in many ways.

The Court: That is right.

Mr. Adams: Foundation for this document is being laid in no way except through the signature of Mr. Twombly.

The Court: That is it, exactly. I have already ruled that no other foundation was laid and that other foundation will have to be laid insofar as the Defendant Twombly is concerned unless you are willing to stipulate that those are the genuine signatures of your client.

It cannot be admitted because no foundation has, as yet, been laid as against your client.” [442]

* * * * *

Mr. Adams: I won’t stipulate to anything at the present moment then under the ruling, and I take an exception to the ruling.

Mr. Campbell: If your Honor please, may I withdraw these two exhibits from the identification numbers?

The Court: Yes. Just leave the identification numbers on them.

Mr. Campbell: May I withdraw or take with me the two exhibits?

The Court: You may take them out of court.

Mr. Campbell: Now, I wish to read from the minutes of the Investment Finance Company. Might I state, Your Honor, that the statement I made just prior to the noon recess that the evidence now being offered is being offered as to all defendants with the exception of the Defendants Twombly and Cronk still apply?

The Court: Before we go into that, I think I want to explain my ruling. Maybe I haven’t made it clear.

These minutes and a letter to which I alluded were offered in evidence. There was no foundation laid for their admission by having anyone take the stand and show that they were the records of the corporation kept in the regular course of the business and that it was

the habit of the company to keep records of that type.

In the absence of that foundation the documents were, regardless of how I felt about their materiality if admitted, they were not admissible unless they could be admitted under the stipulation which we have heretofore had, * * * council making the point that no proper foundation was laid, and refusing to take any position as to signatures, they cannot at [443] this time be admitted without a further foundation as to the defendant Twombly.

As to the defendants represented by the two attorneys, they may be admitted under the stipulation.

Mr. Irwin: Might it be understood that the particular objections made outside of the jury's presence might be deemed to have been made and they still apply, together with your Honor's ruling and exception allowed?

The Court: They will go in just the same.

Mr. Campbell: Reading from plaintiff's Exhibit 37, the minutes of the meetings of the board of directors of the Investment Finance Company.

Mr. Irwin: Pardon me, your Honor, this part here which he is about to read is in connection with that Exhibit 46. Your Honor said you reserved a ruling on that matter. The portion he is about to read refers to the exhibit that is under consideration by your Honor.

The Court: Is that being offered as against

all defendants with the exception of Cronk and Twombly?

Mr. Campbell: Yes, your Honor.

The Court: And you state that you are going to connect it up?

Mr. Campbell: Yes, your Honor.

The Court: With the Counts of the indictment?

Mr. Campbell: Yes.

The Court: They may be admitted subject to the same objection and the same ruling.

Mr. Lawson: Your Honor, the matter really hasn't received a great deal of attention, and I think it is a very important part. Your Honor has read the comments, and you are familiar with them. I merely submit this is a test: That if the witness were on the stand himself [444] he wouldn't be permitted, under objection, to testify, because he would be stating opinions and conclusions. I think that is sound, your Honor.

The Court: I disagree with you on that. I shall when the time comes instruct the jury that this is not being admitted to prove the truth of the statements contained in it, but simply to show that that information was communicated to the defendants. You mean to tell me that if that auditor told these defendants that he wouldn't be permitted to say that he told them in person?

Mr. Lawson: Under the circumstances of

this case I would take that position, your Honor.

The Court: Then that is a matter that will have to go to the Circuit because I disagree with you on it. I will admit it on that point. It is not being admitted to show the truth or falsity of what is contained in that auditor's report, but to show that that audit report was delivered to these directors.

Mr. Lawson: I would like to have included in the objection, which I have already made, the specific objection of hearsay. And further, that it has not been connected up in this manner: That the mere fact that it was on file with the corporate records is no proof of the direct knowledge of the Defendants Ireland and Edgerton.

The Court: That will be also an element for the jury to determine. If it isn't connected up, so that I deem it may be given to the jury, I will strike it before the trial is through. For the present on the promise to properly connect it up and bring it home to the defendants, it will be admitted.

Mr. Lawson: Exception.

Mr. Campbell: I will commence reading from plaintiff's [445] Exhibit 37, the minutes of the board of directors of the Investment Finance Company.

'Meeting of March 15, 1939.

The following directors were present:

Messrs. R. W. Starr

A. R. Ireland

E. C. Thomas

J. L. Smale

Miss F. A. Anderson.

In addition to the directors J. Howard Edgerton, Mr. Bundy Colwell, and Miss Florence Long were present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, it was resolved that the matter of Mr. H. Dean Campbell's report and recommendations for the year ending December 31, 1938 be referred to our attorney who will consult with Mr. Campbell and make recommendations to the board in connection with both financial and policy matters mentioned in the report, with power to call a special meeting of the board at his discretion.' Minutes signed, 'R. W. Starr, Chairman.'

Mr. Campbell: May I read this from the stand?

The Court: Yes. All of this will be subject to the same objection, same ruling, same exception.

Mr. Campbell: Plaintiff's Exhibit 46. It is on the letterhead of H. Dean Campbell, Certified Public Accountant, 416 West 8th Street, Los Angeles, February 25, 1939.

Mr. Campbell:

'Board of Directors
Investment Finance Company
5658 Wilshire Boulevard
Los Angeles, California [446]

You will find herewith the exhibits and schedules which set forth the result of my examination of the accounts of your company as of December 31, 1938. The statements included in this report are as follows:

Exhibit A—Balance Sheet as of December 31, 1938.

Exhibit B—Consolidated balance sheet as of December 31, 1938.

Exhibit C—Consolidated statement of profit and loss for the year ended December 31, 1938.

Schedule I—Schedule of accounts receivable.

Schedule II—Schedule of contracts receivable.

Schedule III—Schedule of notes and loans receivable.

Schedule IV—Schedule of investments.

Schedule V—Interlocking stock holdings.

Schedule VI—Interlocking directorates.

Schedule VII—Interlocking financial obligations.

Attention is directed to the comments which follow, and also to the supplementary report on the First Security Deposit

Corporation. The principal purpose of including Schedules V, VI, and VII, is to direct visually, your attention to the fact that because of the close affiliation of the allied companies, it is almost impossible to confine comments or figures to one company alone. Much that must be said about the activities of one company may well apply to several.

Furthermore, while several legal matters [447] will be raised in the comments which follow, it must be observed that in no case is it the object of your auditor to do more than bring the matters up for discussion. Where legal opinion is desired, either as to the procedures followed in the organization and operation of any of the companies, or as to the present legal status of any accounts, it is not only assumed that you will, but you are advised to consult Mr. Edgerton.

Yours truly,
(Signed) H. D. CAMPBELL, C.P.A.'

The Court: At this time, gentlemen of the jury, I want to caution you again that this evidence is not, or the minutes which were just read, binding upon the Defendant Cronk or Twombly; and that this evidence is not being introduced to prove the truth of the statements made in the document. This is being introduced, as I understand the position of the plaintiff, to show that this information was com-

municated to certain individuals. Is that correct?

Mr. Campbell: That is correct, your Honor.

The Court: In order that you may use that as an element to determine the intent with which the various acts were done by these various defendants.

In connection with this document, or these two documents, the minutes and this auditor's report, in determining intent therefrom, there may be evidence introduced later in the trial as to what was done after these matters came to the attention of these individuals. You may take those matters, if they do come before you, into consideration also in connection with these documents in determining intent, as the Court will at that time instruct you when the point is raised. [448]

Mr. Campbell:

'Investment Finance Company.

Comments

Cash

Cash on hand was counted and reconciled to December 31, 1938, and the bank accounts were confirmed by letter and found in order.

Accounts Receivable.

The accounts receivable are presented in detail on Schedule I and total \$2,038.69, consisting largely of insurance premiums uncollected by the Wilshire Insurance Agency.

Contracts Receivable.

Contracts receivable as per Schedule II are automobile sales contracts. They are presented on Exhibit A at book value, although more than 50% of the dollar balance at December 31, 1938 have been pledged with the American National Bank of Santa Monica as security for a loan which at that date amounted to \$8,700.00.

Notes and Loans Receivable.

Of a total of \$48,413.27 in notes and loans listed in Schedule III, 37,400.00 is unsecured. In fact, the largest single note of \$16,650.00 is signed by Battelle-Dwyer & Co. which, it is understood is no longer in existence.

Investments.

Schedule IV is a presentation of the securities into which the company has put most of its funds, obviously more for purposes of control of the various companies concerned than for income from the securities themselves. Most of the investments have been in the common stocks (or voting [449] stocks) of the various companies upon which little or no dividend income has yet been realized.

Pledge Agreement—California Federal Savings & Loan Securities.

The item of securities owned in the California Federal Savings and Loan Association which is carried at \$15,000.00 is sub-

ject to a pledge agreement of the liquidated Consolidated Investors Corp. with one F. E. Jones, and is secured by the deposit with this company of the following shares of stock in this company:

W. S. Brayton (Has not been
assigned to Investment

Finance)	.....	5,000 Shares
R. W. Starr.....	.....	2,500 Shares
A. R. Ireland.....	.....	5,000 Shares
J. H. Edherton.....	.....	1,666 Shares
F. A. Anderson.....	.....	1,200 Shares
Ed C. Thomas.....	.....	1,160 Shares

Total Shares Hypothecated....16,526 Shares

The above listed individuals are all the endorsers of the said pledge agreement. This agreement apparently was originally intended to terminate on July 23, 1939, but it should be noted that there was a typographical error on the agreement itself so that it actually reads July 23, 1936.

Deed of Trust—Pacific Brick Co.

Interest has been accrued to August 1, 1938 on a first trust deed on all the property of the Pacific Brick Co., which was the approximate date of acquisition by this company. [450]

Real Estate.

The real estate shown on Exhibit A at \$5,608.19 consists of a house built for re-

sale. It is mortgaged to the extent of \$3,673.18 as shown under First Trust Deed Payable.

Accounts Payable—First Security Deposit Corporation.

This account has gradually been built up to its present figure over the past three years by numerous advances from First Security Deposit Corporation on open account without security. Interest has been paid at the rate of 3 per cent per annum, but this interest has been paid in bonds of the First Security Deposit Corporation at face value, thus reducing the effective interest rate because all such bonds purchased by this company have been acquired at a substantial discount.

Inter-locking Schedules.

Schedules V and VI respectively, show the inter-locking stockholders and directors of the eight related companies. Schedule V is presented on transparent paper so that the two charts may be considered either jointly or separately. Only those stockholders or directors are included on the charts who are connected with two or more of the companies involved.

Schedule VII presents inter-company financial obligations with amounts. The broken lines indicate unsecured obligations and the solid lines indicate obligations which are either fully or partially secured. [451]

General.

With reference to the "Noon deal" mentioned on page 2 of comments, no attempt was made to verify the present status of the note or pledge agreement. It would appear to be a doubtful asset at best. It is also possible that the manner of showing the account as Savings and Loan shares is questionable since probably all the Investment Finance obtained was an agreement or contract rather than the shares themselves.

Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlocked as to appear identical in effect (see Schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to

the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation. [452]

These questions, then, should be answered, and do they constitute fraud:

(a) The purchase of First Security Deposit Corporation bonds at a discount, and the re-sale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to others?

(b) Taking over the Wilshire Insurance Agency, and diverting commissions formerly earned by the First Security Deposit into the income of the Investment Finance?

In addition to these questions there might be raised the more general one of whether, since in acquiring funds from Security—which funds were in most instances profitably invested—the re-investment in such mismanaged enterprises as Bonds-17, for example, might on its face be construed to be fraud and mismanagement regardless of the answers to the hypothetical questions propounded above.

It would also appear that perhaps in some instances letters sent out by Mr.

Cronk might be criticized as being misstatements of fact, and still further, might bring the company under the S. E. C. because they were sent through the mails out of the state.

In summarizing, it would appear that it might be difficult to justify legally, the existance of the company in any particular, as it is now operating. As your auditor, I wish merely to direct the [453] above matters to your attention, realizing that you have no doubt considered them before.

To Directors interested, attention to the supplementary comments on the First Security Deposit Corporation might be directed.'

Attached thereto is Exhibit A, Investment Finance Company, Balance Sheet, December 31, 1938, setting forth the following assets:

'Current Assets.

Cash on hand.....	2,477.64
Bank of America.....	1,258.14
America National Bank.....	694.64
Accounts Receivable	
(Schedule I)	2,038.69
Contracts Receivable	
(Schedule II)	21,625.94
Notes Receivable	
(Schedule III)	32,560.42
Loans Receivable	
(Schedule III)	15,852.85
Total Current Assets	76,508.32

Investments. (Schedule IV)

American National Bank (1).....	32,296.00
First Security Deposit Corp.	
(2)	86,393.75
Bonds—17 Dog Food Co. (3).....	44,935.00
Calif. Fed. Sav. & Loan Assn.	
(4)	15,000.00
Pacific Brick Co. (5).....	29,850.00
American Bldg. & Investment Co.	
(6)	17,000.00
Second Trust Deeds (7).....	196.19

Total Investments	225,670.95

[454]

Fixed Assets

Automobile	1,027.88
Less: Depreciation	
Reserve	401.13 626.75

Used Car Lot #1 Im- provements	2,145.17
Less: Depreciation	
Reserve	429.05 1,716.12

Furniture and Fixtures..	252.00
Less: Depreciation	
Reserve	5.71 246.29
Equipment	17.85
Real Estate (Contra)	5,508.19

Total Fixed Assets	8,215.20

Other Assets

Prepaid Expenses	240.35
Organization Expense	563.87
Deposits	150.00
Collections Advanced	70.00

Total Other Assets	1,024.22
Total Assets	311,418.69
	=====

Liabilities

Current Liabilities

Accounts Payable—First Security

Deposit Corp. 267,842.10

Accounts Payable—Miscellaneous 486.70

Notes Payable—American Na-

tional Bank 8,700.00

Accrued Insurance Payable 144.82

Accrued Unemployment Ins. Ex-

pense 35.47

Accrued Old Age Benefit Expense 13.13

Total Current Liabilities 277,222.22

Other Liabilities

First Trust Deed Payable

(Contra) 3,673.18

Reserves and Deferred Credits [455]

Unearned Discount on Contracts

(Schedule II) 1,074.19

Suspense 13.05

Dealers Mutual Reserves 2,071.65

Reserve for Contract Losses 29.30

Reserve for Unemployment In-

surance Tax 13.50

Reserve for Old Age Benefit Tax 13.14

Total Reserves and Deferred

Credits 3,214.83

Net Worth

Capital Stock

(Authorized 200,000 Shs.

Par \$1) Outstanding 31,398.00

Operating Surplus

Balance December

31, 1937 342.07

Net Loss Year 1938

(Exhibit C) 4,431.61

Surplus (Deficit) Dec. 31, '38 4,089.54

Total Net Worth 27,308.46

Total Liabilities and

Net Worth 311,418.69'

The Court: Now, gentlemen, I again want to caution you that you are not to consider that audit report (or the minutes) for the truth or falsity of what they contain other than the showing that is indicated, the minutes, that this document was discussed. It has been introduced and been accepted only to show the intent or as one of the elements of intent together with other things that may be introduced during the course of the trial, and you are to keep your mind open even on that element.” [456]

CLARENCE N. BRUCE,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

In my examination of the books and records of the Investment Finance Company and the First Security Deposit Corporation, I determined the amounts borrowed in cash or other assets by the Investment Finance Company from the First Security Deposit Corporation after the month of March, 1939; the amounts borrowed in cash in the months of April, May and June were respectively \$7,000, \$8,000 and \$7,000; the July real estate had a book value of \$15,000; September cash \$500, October cash \$3,500; November real estate book value \$12,900; and in 1940, January cash \$10,000; March cash \$500.00;

(Testimony of Clarence N. Bruce.)

"Q. Will you state, giving the date upon which bonds, that is to say, the date, month and year, upon which bonds were conveyed or transferred from the Investment Finance Company to the First Security Deposit Corporation, giving the face amount of the bonds and accrued interest for which credit was given; and stating the application made of such bonds; the cost to Investment Finance Company of such bonds; and what the profit and loss account of Investment Finance shows, if anything, in connection therewith:

A. March 24, 1939, collateral trust bonds of the First Security having a face principal amount of \$3600, to which accrued interest of \$72 was added, totalling \$6,372, transferred to First Security, for which full credit was given as follows: To apply on the principal of the debt due First Security, \$578.85; in exchange for first trust deeds, \$3,093.15.

The cost to Investment Finance Company for such bonds was \$2,559.58. The profit to Investment on such bonds was \$1,112.42. [457]

April 29, 1939, First Security collateral trust bonds having a face value of \$63,137.70, to which accrued interest of \$14,207.89 was added; totalling \$77,345.59 were transferred to First Security, for which full credit was given as follows: To apply on the principal amount of the debt due First Security \$74,591.88; to apply on the interest due on such debt \$2,753.71.

(Testimony of Clarence N. Bruce.)

The cost to Investment Finance Company for such bonds was \$48,642.52. The profit realized by Investment Finance Company on such bonds was \$28,703.07.

May 31, 1939, collateral trust bonds, of the First Security, having a face principal amount of \$4,928.65 to which accrued interest of \$1,146.07 was added, totaling \$6,674.72, which bonds were transferred to the First Security Deposit Corporation, for which full credit was given as follows: To apply on the principal of the debt due First Security, \$6,074.72.

The cost to Investment Finance Company for these bonds was \$5,354.16. Investment Finance Company realized a profit of \$720.56 on such bonds.

June 30, 1939, First Security collateral trust bonds having a face value principal amount of \$825.63, to which accrued interest of \$214.24 was added, totaling \$1,039.87 was transferred to First Security, for which full credit was given as follows: To apply on the principal of the debt due First Security \$1,039.87.

The cost to Investment Finance Company for these bonds was \$936.67. Investment Finance Company realizing a profit on such transaction in the amount of \$103.20.

On July 31, 1939, First Security collateral trust bonds having a face principal amount of \$500, to which accrued interest in the amount of \$22.50 was added, totaling \$522.50 [458] were

(Testimony of Clarence N. Bruce.)

transferred to First Security Deposit Corporation for which full credit was given as follows: To apply on the principal of the debt due First Security \$522.50.

The cost to Investment Finance Company for these bonds was \$522.08; profit to Investment Finance Company on such bonds was 42 cents.

On October 31, 1939, collateral trust bond of the First Security, having a face principal amount of \$1.28, plus accrued interest of 51 cents, totaling \$1.79 was transferred to the First Security, for which full credit was given as follows:

To apply on the debt, \$1.79; the cost to Investment Finance Company of this bond was \$1.79, no profit or loss resulting.” [459]

“The Court: In order to keep the record clear, Mr. Bruce, on one or two occasions you said that certain real property was borrowed.

* * *

The Witness: It was certain real estate upon which the valuation was placed, apparently mutually agreeable, and it was the book value on the First Security books was transferred to Investment Finance Company and the amount of that real estate was added to this account payable.

The Court: There is nothing in the books

(Testimony of Clarence N. Bruce.)

to indicate that that particular real estate had to be returned?

The Witness: No, sir,

Mr. Campbell I am going to read now from plaintiff's Exhibit 21, the minutes of the board of control of the Realty Deposit Company, reading from the minutes of November 13, 1933.

This is offered as to all defendants. I am going to a new subject. These are the minutes of the board of control of the Realty Deposit Company, plaintiff's exhibit 21, and I am offering this line of testimony as to all defendants subject to being connected up.

The Court: It will be received subject to a motion to strike and an exception will be allowed.

* * * * *

Mr. Irwin: And may I have this understanding, if it is agreeable to the Court, that when counsel hereafter reads from any documents that have heretofore been introduced, there is no necessity to repeat the objections that were made at the time the document was received.

The Court: Yes, it is so stipulated.

Mr. Adams: I do not know what that former objection contained, your Honor, because it was so long ago since [460] we made it, but may it have with it the objection that it is hearsay and that it is incompetent? I believe

(Testimony of Clarence N. Bruce.)

the objection of materiality has long since been made and incorporated within the objection.

The Court: The objection may have been deemed to have been made and overruled and exception allowed subject to a motion to strike.

* * * * *

Mr. Campbell: Reading now from the regular meeting of the board of control of the Realty Deposit Company, November 13, 1933, which is a portion of plaintiff's exhibit 21, reading in part only:

'All members of the board of control were present. Item 6, Mr. Edgerton was called from the meeting. 7, the board of control authorized Hunter Nessler, assistant secretary, to execute contract of sale for real estate located at 1122 Sterns Drive to J. Howard Edgerton,' dated November 3, 1933, copy attached.

The minute is signed 'Dr. R. W. Starr, President.' And attached thereto is a communication dated November 13, 1933:

'Board of Control,
Realty Deposit Company,

I am today in receipt of an offer from J. Howard Edgerton, of \$2,300.00 in cash for property located at 1122 Sterns Drive, Los Angeles. Mr. Edgerton opened negotiations prior to the establishment of this company for the purchase of this property in \$7,700.00 First Security bonds. Inas-

(Testimony of Clarence N. Bruce.)

much as we have sufficient funds to cover this at a price better than \$28.00, I consider it advisable that we accept it on a cash [461] basis, and supply the bonds ourselves which we will be able to do, not to exceed \$2,000.00. As Mr. Edgerton is paying all expenses, it will give us a net cash profit at least \$300.00.

Yours very truly,
S. H. NEFFLER.”

The witness further testified: That the books and records of the First Security Corporation showed a transaction between the Company and the defendant J. Howard Edgerton on April 24, 1934.

“Q. Now what do the books disclose as the consideration received for this real property?

Mr. Lawson: * * * We object to this as not proper evidence on the ground that it is not calling for a summary of evidence. * * * The books constitute the best evidence.

Mr. Irwin: I interpose an objection to this line of testimony on the grounds it is immaterial and doesn't tend to establish any of the issues raised in the indictment as to any of them.

The Court: The objection will be overruled and exception allowed, subject to a motion to strike, if not properly connected up.

* * * * *

(Testimony of Clarence N. Bruce.)

Mr. Lawson: * * * I would like to add to the objection heretofore made, the specific objection that this evidence is incompetent, irrelevant and immaterial, and not within the issues of the case in that it has no bearing upon any particular charge as alleged in the indictment. It is an isolated transaction tending to create prejudice, * * *. [462]

The Court: The objection will be overruled. The rule of law I think is very clear.

Mr. Lawson: Exception.

The Court: * * * it is frequently impossible to do other than to take a lot of different items, and the jury are entitled to consider a lot of different items in order that they may arrive at a determination under the instructions of the Court. If, at the conclusion of the plaintiff's case, the motion to strike is made, and I feel that it has not been connected up, I will then strike it. In the meantime, on the plaintiff's undertaking to connect up these various items I am admitting them * * *.

Mr. Lawson: I would want to include in the objection the remoteness of the evidence.

The Court: Are you introducing this to show intent only?

Mr. Campbell: Yes."

Thereupon the witness testified: That he had found the entries in plaintiff's Exhibit 24, and that the account shows a debit to the account.

(Testimony of Clarence N. Bruce.)

"A. That is, the entry shows a debit to the account, company's bonds acquired at cost, \$7,155.06; the debit to the account Reserved For Depreciation, Real Estate (out of trust) \$199.40; credit to real estate, Harris No. 515, \$7,139.09; profit and loss on real estate, \$215.37. This Harris No. 515, is the name on the company's books by which the property at 1122 Sterns Drive was known. The explanation given for the entry here is No. 515-R232, sold by J. Howard Edgerton for bonds A6646-19.73; A6931-80; A5033-\$5,600.00; A6637-\$1,455.33; total \$7,155.06. [463]

Q. Now, with reference to those bonds which you have just referred to as having been received from Mr. Edgerton in connection with this deal, did you examine the books and records of the First Security Deposit Corporation for the purpose of determining the source of such funds? A. Yes.

Q. What did your examination disclose in that connection?

Mr. Adams: I would like to get an objection in here, an additional objection to the ones I have had.

The Court: Never mind any argument. The objection will be overruled; exception allowed; subject to a motion to strike.

Mr. Adams: It is also hearsay.

Mr. Butler: That is as to all defendants?

The Court: As to all defendants.

(Testimony of Clarence N. Bruce.)

Mr. Lawson: I would like to have each record rather than a summary by this witness, as to what it shows.

The Court: Your request will be denied, if it is understood that he will produce them afterwards, and he is summarizing them now.

Mr. Lawson: Exception."

The Witness: The record discloses that these bonds were the property of the First Security Deposit Corporation. Bond No. 6646 for the face amount of \$19.73 was acquired by the First Security Deposit Corporation on March 13, 1934, at a price of \$4.93; bond 5033 in the face amount of \$5,600 was acquired by the First Security on March 28, 1934, at a price of \$1,708; bond No. 6637 in the face amount of \$1455.33 was acquired March 28, 1934, by the First Security at a price of \$465.71; bond No. 6931 in the face amount of \$80.00 was acquired by the First [464] Security on March 20, 1934, at a price of \$28.00. The total full face amount of those bonds is \$7,155.06 and the total price paid to the First Security for such bonds was \$2,206.64. The records reflected that these bonds were transferred from the First Security Deposit Corporation to J. Howard Edgerton on the 20th day of April, 1934, and the price paid for them by First Security is reflected in the records as \$2,021.29.

(Testimony of Clarence N. Bruce.)

"Mr. Lawson: * * * There was one part that Mr. Bruce finally pointed out to me which shows the substance of the transaction from the records and is the result of it—'the witness said profit or loss in real estate.'

The Witness: I read it verbatim.

Mr. Lawson: It shows profit.

The Witness: It is a credit item, that is correct. The ledger account is under the title 'profit and loss.'

The Court: Is that a debit or a credit to the profit and loss account.

The Witness: That is a credit account. That is 'and' profit and loss. That is a credit account which would be normally a profit account."

The witness further testified: That as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation to do to First Security on notes payable in the amount of \$250,465.80. That obligation was retired as of that date; assets were transferred to First Security.

"Q. Will you state what those assets were as reflected by the books?

Mr. Irwin: Might it be understood that this testimony as to the items is particularly objected to as [465] immaterial, and not within any of the issues of the case.

The Court: The objection may be considered to be made as to all defendants to whom

(Testimony of Clarence N. Bruce.)

the testimony is applicable; overruled; exception allowed subject to a motion to strike unless properly connected up.

Mr. Irwin: I should like to add the objection of hearsay.

The Court: It may also be considered to have been objected to on the ground of hearsay, and overruled; an exception allowed.

The Witness: Notes receivable, \$44,010.02; obligations of the Pacific Brick Company, \$38,415.33; obligations of the Bond-17 Dog Food Company, \$111,018.81; obligations of the American Building and Investment Company, \$19,339.74; stock of the American National Bank of Santa Monica, \$23,646.00; stock of the First Security Deposit Corporation, \$29,984.80; second trust deeds, \$28.67; furniture and fixtures, \$12.67. Prepaid expense, \$17.47; Suspense, which is the reserve for contingencies, \$250.25; total, \$266,723.76.

By Mr. Campbell:

Q. Now, with reference to the notes receivable, will you state of what items that consisted?

A. Battelle-Dwyer Brokerage Company, \$100; C. E. Kenner, \$1.00; Roy A. Muller, \$6,543; P. S. Noon, \$10,200; R. W. Starr, \$11,050.50; J. Howard Edgerton, \$10,084.25; Emery Hallowell, \$5,371; E. C. Thomas \$236.21; A. R. Ireland \$500; James White \$23.06."

(Testimony of Clarence N. Bruce.)

(The following conference at the bench was held outside the hearing of the Jury.) [466]

"The Court: When you come to breaking these down, I think that the objection will be sound as to those corporations in which it can't be shown that there was an interest on the part of these defendants.

Mr. Campbell: You think that would apply to the form of the obligation which was transferred, your Honor?

The Court: Yes. I think that when you get beyond the total then you are getting into something that might be prejudicial, and I think the objection on that ground is sound.

* * * * *

Mr. Campbell: I think it is true as to most of these companies that the defendants went on the board as a matter of policy of the Investment Finance Company, but that is not true, we intend to show, of two of such investments: Pierce Petroleum and Pacific Brick Company; as to the others we will abide by your Honor's ruling in that connection.

* * * * *

Mr. Lawson: To save time, we know the facts, I think, and I think that you will agree whatever stock was in the hands of the defendants here did not constitute in any measure control of the Pacific Brick.

Mr. Campbell: They had a minority interest.

(Testimony of Clarence N. Bruce.)

Mr. Irwin: 3,000 out of 50,000-odd thousand."

(The following proceedings were had in the presence of the Jury.)

The witness further testified: That at the time of the transfer of these assets, the Investment Finance Company transferred the notes payable to First Security, \$250,465.80; reserves for depreciation on furniture and fixtures \$3.15; notes payable [467] to the American National Bank in Santa Monica \$1,000; reserve for contingency \$250.00; making a total of \$251,718.95.

"Q. Now, as of that 31st day of August, 1941, what do the books and records of the Investment Finance Company reflect as to profit or loss from operations of that company?

Mr. Irwin: Your Honor, I don't mean to interrupt. My objection a few minutes ago goes to all this line of testimony, would it not?

The Court: Same objection and same ruling.

The Witness: The books reflect that the Investment Finance Company had a deficit of \$16,393.19."

The witness further testified: The assets transferred exceeded the liabilities transferred by \$15,004.81. It was taken up in the capital surplus account of the First Security in the same status as donated surplus.

(Testimony of Clarence N. Bruce.)

(In the absence of the Jury, the following proceedings were had:)

"The Court: As I understand it, the Government proposes to go into the transaction, the history and the organization of two of these corporations that we were discussing yesterday as 'A to X; is that correct?

Mr. Campbell: The Pierce Petroleum and the Pacific Brick Company.

The Court: In order that we may argue that out now, while we have the time, what is the theory of the Government as to that connection. Are those matters going to be introduced as applicable to all defendants and are they to be introduced as bearing only on intent?

Mr. Campbell: Yes, your Honor. [468]

Mr. Lawson: I don't see how the evidence, that the Government intends to introduce, is applicable to the intent, the quality of the intent, as involved in this case. The Pacific Brick Company, for example, I think the evidence will show a long series of transactions along toward either the middle or the end one or two of the defendants acquired some stock in the Pacific Brick Company. The defendant Edgerton received a small amount of stock which he considered as satisfaction for services rendered in connection with that Pacific Brick Company; and some other services were performed by some of the other defend-

ants. I think that there were two other defendants. They actually earned whatever compensation was given to them in the form of stock, and it was a very small percentage. That was theirs. It was an individual transaction as between the Pacific Brick Company and the different defendants.

It is not related to whatever assistance was given to the Pacific Brick Company from funds furnished by the Investment Finance Company. I can't, by any stretch of the imagination, see where that particular stockholding would be a justification for introducing into evidence all of the transactions of the Pacific Brick Company because, when it is all said and done, about the only thing that you could deduce from it would be the fact that the funds advanced to the Pacific Brick Company, by the Investment Finance Company, resulted in a loss. * * * He intends to show that that money was put into the Pacific Brick Company and it was a bad investment.

Now, the Government can't show, I am satisfied, and I think Mr. Campbell will probably corroborate it, that any of that money, that was advanced by the Investment [469] Finance Company, found its way into the pockets of any of these defendants.

When you get all through with these transactions you have nothing left but an impression that these men made some mistakes in management.

What has that to do with the specific intent to formulate a scheme, such as alleged in the indictment, back in 1931 or 1932, to convert the assets of the old Railway Mutual Company, and thereafter to divert those funds to the Investment Finance Company?

They are bridging a span here of five, six, or seven years to relate back to the formation of this scheme, and to me it seems that much of the evidence, that the Government has promised to connect, they are going to have a great deal of difficulty. * * *

They have got to prove right from the very beginning that the intention to reorganize the Railway Mutual Company was done at that time with the specific intent to take the funds that belonged to the Railway Mutual Exchange in the manner in which it is alleged in the indictment.

But here we get into the ramifications of the management of the Pacific Brick Company as to its management, whether or not they were justified in doing what they did.

Your Honor, it involves so much that we would be driven to get into all of the operations of the Pacific Brick Company. There was a reorganization of the Western Brick Company. There was a transfer of assets, and litigation grew out of that, extended over a period of two years, and the defendant Edgerton was in the midst; he handled all of that litigation for a period of two years, got outside financ-

ing to help build up the Pacific Brick Company. * * *. [470]

The Court: * * * As I understand, Mr. Lawson, and I have gone all over this to be sure, we refreshed our memory as to what the indictment specifically charges, it is Mr. Lawson's contention that if any of the substantive counts or the conspiracy count are to be substantiated by the plaintiff, that the crime was complete when we investigate the organization, functioning, and dealings of the Investment Finance Company; and that we can't go beyond the records, including books of account, minute books, and other records of the Investment Finance Company because that completes the crime alleged; that if we start in to an investigation of the organization functioning, and the dealings of these corporations, which we have referred to as Corporations A to X, to whom money was loaned by Investment Finance Company, or in which companies Investment Finance Company had an interest, we are getting into an interminable amount of proof, and placing the defendants in a position of having to spend many days in going back in the history of these separate corporations and showing that they were rigidly organized in good faith; that they had a chance for their White Alley, that while they may have made bad investments and it may be, as conditions turned out, their investments were valueless, that there was no bad faith in con-

nnection with any one of these corporations A to Z, which could properly be brought home to these defendants other than as is indicated by the books and records of the Investment Finance Company.

And that to go into those matters would be prejudicial to the interests of his clients for several reasons and, specifically, that it would becloud the issue and might confuse the jury in trying the defendants for crimes not alleged in the indictment. Have I stated substantially your position? [471]

* * * * *

Mr. Campbell: * * * If I may address myself to the subject which was under discussion prior to the recess, namely the proposed evidence relative to the so-called corporations, A to Z, I wish to state at the outset that in my considerate opinion that the defendants, aside possibly from such investment as the Pierce Petroleum, that the defendants entered into these various investments in good faith, believing that they were profitable enterprises, and we are not charging them with bad faith, which it may or may not have been, as to making those investments.

The Government's theory, however, is this: I might say it is two-fold. In the first place, I wish to direct the Court's attention to the allegation appearing at the very bottom of page 4 of the indictment:

'That the said defendants at all times represented and pretended that said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of the said assets received by it from the Railway Mutual Building and Loan Association; whereas in truth and in fact, the defendants, and each of them, then and there well knew that no such liquidation was in fact being carried into effect and the said defendants were, as hereinafter alleged, converting said assets to their own use and benefit;'

* * * * *

The ultimate fact to be considered is not the management of these other concerns. We are not concerned with that, nor do we intend to offer evidence in that regard, but we feel that we are entitled to place before the Jury the nature of those investments; that is to say the type [472] of company in which the investment was made and the nature of the investment. That is to say, whether by stock or other security or by loans and so on.

To that evidence the jury can look in part for the intent of these defendants in diverting the funds of the First Security Deposit Corporation to the Investment Finance Company. In other words, it is our contention that that evidence will show that the defendants' scheme was to obtain large profits, which

profits, from the setup of the Investment Finance Company, would be to their own profit and not to the profit of the First Security Deposit Corporation. It is with that thought and upon that theory that the evidence is being offered.

It is being offered in the second place as to this representation I have pointed out in the indictment, that they were in the process of liquidating. The fact that this money was first diverted to the Investment Finance Company and then placed into the form of permanent investments in other companies through the actions of the defendants, and with their knowledge, and with their knowledge at the time such representations were being made, such as those made in the letter to Mr. Richmond by the Defendant Twombly; that would show the falsity of the representation that they were liquidating, and show the intent with which the defendants were performing those acts.

* * * * *

I concede that we are not entitled to, and that it is no issue here, as to the good or bad management of those concerns, but I do think we are entitled to show the nature of the investments made and type of concern to which it was made, and by 'type' I mean the nature of the business which was being conducted by that concern. For [473] instance, the fact that one concern was in the business of manufacturing dog food.

* * * *

The Court: Now, taking up first this paragraph at the bottom of page 4 in which the allegation is made; 'that the said defendants at all times represented and pretended that said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of the said assets received by it from the Railway Mutual Building and Loan Association; whereas in truth and in fact the defendants, and each of them, then and there well knew that no such liquidation was in fact being carried into effect and the said defendants were, as hereinabove alleged, converting said assets to their own use and benefit,' now that allegation covers both the assets that went from Railway Building and Loan into the Metropolitan Trust and also into Investment Finance. Now, I am inclined to think that insofar as that allegation is concerned, that the plaintiff's proof is complete by the showing of the books and records of Investment Finance which disclose investments in these various corporations and that it is unnecessary to go further into those corporations as I see it at the present time.

Now, so far as the intent is concerned, however, I am inclined to think that the position of the plaintiff is sound, that they are entitled in a case of this type to show the investment of the funds of Investment Finance in these corporations A to Z. I think they would be en-

titled to show the character of business in a general way connected by those corporations by the articles of incorporation if they disclosed them or by any other legitimate means to show, for example, that one was a dog and cat food company, [474] that one was an oil well company, that another one was a bank, and so on.

I am inclined to think also that they would be entitled to show that Investment Finance made such a substantial interest in these corporations or some of them as to give them either control or a very great influence in the management of those corporations and that at the request or by acquiescence or ratification Investment Finance Board either permitted or justified the occupation on the board of directors of these various corporations of Investment Finance directors in order that they might have a say in the management of those corporations.

I am inclined to think that as a part of that intent applicable at least to those directors who actually went in as directors of these corporations A to Z, they would be entitled to show the personal interest of those directors in the stock of the corporations outside of the interest which Investment Finance itself had.

I do not believe that they would be entitled to introduce any evidence having to do with the legitimate or illegitimate, good or bad, wise or unwise management of those corporations; that is not an issue here.

* * * * *

Mr. Lawson: Your Honor, I was wondering whether or not your Honor had in mind the succeeding paragraph to the one that has just been referred to at the bottom of page 4, which is at the top of page 5. Now, there is the specific paragraph. It states that the moneys instead of being put in loans secured by legal investments, which was the representation made to the investors, was loaned without security to the Investment Finance Company. Now, it seems to me that in line with the observation that your [475] Honor made in regard to the liquidation, that is, that the records themselves show that, according to the contention of the plaintiff, that it was not, let us say, in liquidation, now, that is finally decided.

Now, the same applies to the lending of money from the First Security to the Investment Finance Company, because it puts a very sharp limitation on that. And that is that instead of lending the money and securing it by legal investments, large sums of money belonging to the said corporation, that is, to the First Security, were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.

Now, I take it that we are entitled to rely upon that allegation in the indictment. In other words, if that is a violation, it is complete upon

the lending of the money without security to the Investment Finance Company.

The Court: Well, * * * is that one representation false in fact made as a part of the scheme to defraud or the conspiracy to defraud and in carrying into effect the agreement of conspiracy or the agreement to defraud is not exclusive of another, that in the paragraph 4 the charge is made that there was to be liquidation. That is one charge.

Now, there is another charge which seems on its face to be conflicting with the prior charge, but we must keep in mind that these are representations made by the defendants to those persons intended to be defrauded, both of which the plaintiff claims were fraudulent, they were untrue, so that the fact that they were inconsistent doesn't interfere with the propriety of their being so charged in the indictment. [476]

First they charge that representations are made by the defendants that there were to be no investments in effect. There was to be merely liquidation. Then they charge that the defendants represented that the First Security 'would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said

corporation were loaned and diverted to the defendants and to Investment Finance Company * * *. While on the face of them they seem inconsistent I don't feel that that is any valid defect in the indictment.

* * * * *

Mr. Lawson: Except that this indictment is a criminal document, of course, and the defendants are entitled to every favorable construction. That is, where there appear to be any conflicts of any kind whatsoever, that that construction which is favorable to them must be the construction placed upon the document. That goes to every intendment and every part of the indictment. I would say also in line with the observation that your Honor made that that paragraph at the bottom of page 4 in connection with the liquidation of the assets could apply to both the collateral bonds and to the stock of the First Security.

The evidence in this case so far, and Mr. Campbell will not controvert it, up to the end of the case, will be that there was a liquidation of the trust. That stands up monumental. It is there. There isn't any question but what there has been a liquidation and that comprises [477] by far the major part of all of the assets involved.

The Court: Is a part of your defense conceivably this: That liquidation doesn't mean liquidation for cash, under conditions as they existed during the life of this corporation,

liquidation for cash might have been impossible and there had to be liquidation by indirection. You have a piece of real property you want to get rid of. You have to swap it for a drug store and a pearl necklace and a cow and a horse. Then you swap the cow for something else, and the horse for something else, and you gradually liquidate. You may have to run the drug store in the process of liquidation and still be liquidating. That may be your intent.

Mr. Lawson: I don't know whether I have made my point very clear, your Honor, in regard to a charge in the indictment, that we cannot be shot at with a shotgun. We are entitled to be shot at with a rifle if you are going to shoot at us.

The Court: If you can't be shot at with a shotgun in a conspiracy indictment, an indictment of this type, I don't know what a shotgun is because that is the very nature of the charges.

Mr. Lawson: I think, your Honor, that that illustration is still good because we are entitled to know and rely upon the exact charge of what the conspiracy is and the conspiracy charged in this indictment specifically limits the funds that were transferred from the First Security Deposit Corporation to the Investment Finance Company to funds that were advanced without any security and in violation of the promise to the investors that it would be in the form of legal investments.

Now we get back of that and we take in one step [478] further. We say that not only was it lent without any security, but the defendants took this money and put it into various enterprises.

Regardless of what counsel of the Government might say, we all can well appreciate that back of this there lurks the danger, not only the danger, but I would say it is almost a certain result that the jury are bound to be prejudiced. They can't help it. Not only that, but we are not in a position to properly defend ourselves.

* * * * *

The Court: * * * I have ruled on that and I don't want any further argument * * * I will give you all an exception to the ruling that I have made on what I proposed to do with the admissibility of the evidence."

(Jury returns.) [479]

DELLA P. TALAMANTES,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am the Mother of Jack Winston; he and I were investors of the Railway Mutual Building and Loan Association.

(It was stipulated that her son was a minor and that she acted in his behalf as Guardian.)

"Mr. Adams: I want to object to any testi-

(Testimony of Della P. Talamantes.)

mony from this witness on the ground that it is immaterial to any of the issues of this case.

The Court: Same objection, same ruling.

Mr. Irwin: That will go to all her testimony.

The Court: Yes.

Mr. Lawson: As to all defendants.

The Court: Yes.

Mr. Irwin: Exception.

Q. Mrs. Talamantes, as guardian of your son Jack Winston, did you have submitted to you a plan from the Reorganization Committee of the First Security Deposit Corporation inviting you to accept their plan and exchange your securities, which you then held in the—

Mr. Adams: Objected to as leading and suggestive, your Honor.

The Court: Well, it is a preliminary question.

By Mr. Crawford:

Q. In which there was submitted to you a plan by the Reorganization Committee of the First Security Deposit Corporation? Was there such a plan submitted to you, Mrs. Talamantes?

A. I think there was a printed plan.

Mr. Butler: Just a minute. I object to this and move to strike the answer on the grounds it is hearsay as to [480] the defendant Cronk; no proper foundation laid for anything, if he is referring to a document.

The Court: Objection overruled.

(Testimony of Della P. Talamantes.)

Mr. Adams: Exception.

Q. Mrs. Talamantes, I will ask you if you exchanged your securities of the Railway Mutual Building and Loan Association to the First Security Deposit Corporation—First Security Deposit Corporation after there had been submitted to you the plan which I just asked you about.

A. I think I did. I am a little hazy about it. I have seen the plan before that.

Q. After you saw the plan, Mrs. Talamantes, did you then exchange your securities that you then held in the Railway Mutual Building and Loan Association to the First Security Deposit Corporation?

A. Some little time later.

Q. And did you receive in exchange for your securities from the First Security Deposit Corporation the following security: A-2463 cumulative bond, five year, in the face value or sum of \$387.23?

Mr. Lawson: Just a moment, your Honor, before the witness answers that question. I thought counsel was going to follow that up and show us what the plan was. Now he says you have seen a plan. What is the plan? I don't know what he refers to.

The Court: You can't try his case. You have a right to cross examine. He has asked for a plan and she said, 'Yes.'

(Testimony of Della P. Talamantes.)

Mr. Irwin: I object to that as not the best evidence, calling for a conclusion.

The Court: Well, if she doesn't know what she received, there is nothing technical about that, if she [481] received a bond with that number on it, she certainly knows it. She doesn't have to be any expert accountant or a lawyer to tell us. Objection overruled.

Mr. Irwin: Exception, please.

The Court: What you mean is, you got a piece of paper with that number on it, and that you believed it to be a bond?

The Witness: Yes.

Mr. Irwin: Your Honor, while that is being examined, might that question where she was asked about the plan, if she received the plan, just for the purpose of interposing an objection, might it be considered stricken? There are several objections that I didn't repeat at that time. Might that be considered stricken so that the objection might be interposed that it calls for a conclusion, if she received the plan, and not the best evidence? Might that be considered?

The Court: When you said, 'the plan,' you are referring to any particular plan, or just to a plan of reorganization?

The Witness: Just a plan of reorganization.

The Court: The objection will be overruled. Exception."

(Testimony of Della P. Talamantes.)

The witness further testified: I think I received plaintiff's Exhibit 182, I couldn't swear to it, it hasn't any marks on it I could say about. The envelope isn't with it but I think it is the one I received. To my best recollection I received such a letter through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 182, to which ruling of the Court, the defendants duly noted an exception.) [482]

The witness further testified: That she received the letter, plaintiff's Exhibit 183 for identification, through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, marked plaintiff's Exhibit 183.)

The witness further testified: That she received plaintiff's Exhibit 184 for identification through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 184.)

The witness further testified: That she received plaintiff's Exhibit 185 for identification through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 185.)

(Testimony of Della P. Talamantes.)

The witness further testified: That she received plaintiff's Exhibit 159 for identification through the mail; it was addressed to her son and she opened it; that it came in an envelope.

"Mr. Adams: If your Honor please, after the last letter was introduced, your Honor said the same objection and same ruling. Is that the way we are to carry it, or under the blanket ruling?

The Court: Either way.

Mr. Adams: It doesn't make any difference to me.

The Court: It is admitted subject to the same objection and same ruling."

(Said letter was received in evidence over the objection [483] that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 159.)

The witness further testified: That she received plaintiff's Exhibit 166 for identification through the mail. The pencil notations on the envelope were placed there by me. To the best of my recollection, that is the envelope.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 166.)

"Mr. Crawford: I am reading from plaintiff's Exhibit 182, a letter on the letterhead of the First Security Deposit Corporation, 415

(Testimony of Della P. Talamantes.)

South La Brea Avenue, Los Angeles, California, dated June 22, 1937, addressed to Mrs. D. P. Talamantes, guardian of Jack Winston, a minor, 1820 Acacia Street, Alhambra, California:

‘Dear Madam:

We regret that we find it necessary to exercise our rights as set forth in our bond obligations to extend the maturity date on collateral trust bonds due November 1, 1937.

In accordance with the foregoing the Board of Directors of this corporation at its regular meeting held June 16, 1937, unanimously adopted a resolution to the effect that all record holders of collateral trust bonds maturing November 1, 1937, shall be notified that the maturity date of said certificates has been extended not to exceed eighteen months. This constitutes your formal notice thereof. [484]

Yours very truly,

FIRST SECURITY DEPOSIT
CORPORATION,

(Signed) FLORENCE LONG,
Assistant Secretary.’

Now, reading plaintiff’s Exhibit 183, a letter on the letterhead of the Investment Finance Company, 415 South La Brea Avenue, Los Angeles, May 16, 1938, addressed to Mrs. D. P.

(Testimony of Della P. Talamantes.)

Talamantes, 1820 Acacia Street, Alhambra, California:

'Dear Madam:

You hold securities of the First Security Deposit Corporation (now in process of liquidation), Bond No. A-2463 in the amount of \$387.23 in the name of Jack Winston, a minor, and we are able at this time to obtain for you \$251.69 on same.

Please present this bond for payment, or if you prefer, take it to your bank, endorse by yourself as guardian, together with then enclosed affidavit property executed before a notary and draw a draft on us for this amount through the Duns-muir and Wilshire Branch of the Bank of America, Los Angeles.

This however, is subject to your acceptance within thirty days.

Yours very truly,
Investment Finance Company
By (Signed) C. L. Cronk.'

Reading now from plaintiff's Exhibit 184, a letter on the letterhead of First Security Deposit Corporation, 415 South La Brea Avenue, dated July 17, 1937, as follows:

'To Our Bondholders:

From the time of the organization of this company, it has proceeded with an orderly

(Testimony of Della P. Talamantes.)

liquidation in an effort to obtain the maximum recovery for the out- [485] standing bondholders of the corporation. In the natural course of events, it will be some time subsequent to 1942 before this is accomplished.

In view of the present labor conditions and the governmental attitude toward the taxation of corporations, it is problematical whether the liquidation of the company should be further prolonged. Operating overhead cannot possibly be reduced as rapidly as the company income decreases. Under the circumstances, it has been deemed advisable to contact our outstanding bondholders for the purpose of obtaining their recommendations with reference to future company policy.

For these reasons, I have been employed to conduct a survey of the bondholders of the First Security Deposit Corporation, and will very much appreciate the courtesy of an interview with you. In the near future, I will call upon you, or, if you prefer, I will see you at this office.

Yours very truly,

FIRST SECURITY DEPOSIT
CORPORATION

By: C. L. CRONK.'

Reading plaintiff's Exhibit 185, a letter on

(Testimony of Della P. Talamantes.)

the letterhead of the Investment Finance Company, 415 South La Brea Avenue, Los Angeles, dated November 16, 1937, addressed to Mrs. D. P. Talamantes, 1820 Acacia Street, Alhambra, California.

'Dear Mrs. Talamantes:

You hold securities of the First Security Deposit Corporation, Bond No. A-2463 in the amount of \$387.23, in the name of Jack Winston, a minor, and we are able to obtain for you at this time \$271.06 on same.

[486]

Please present this bond for payment, or if you prefer, take it to your bank, endorse by yourself as guardian, together with the enclosed affidavit properly executed before a Notary and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America, Los Angeles.

This however, is subject to your acceptance within ten days.

Yours very truly,
INVESTMENT FINANCE
COMPANY
C. L. CRONK.'

Reading plaintiff's Exhibit No. 159, a letter on the letterhead of the Investment Finance Company, 415 South La Brea Avenue, Los Angeles, California, July 1, 1938, addressed to

(Testimony of Della P. Talamantes.)

Jack Winston, 1820 Acacia Street, Alhambra, California:

'You hold securities of the First Security Deposit Corporation (now in process of liquidation), Bond No. A-2463 in the amount of \$387.23, and we are able to obtain for you \$290.42 on same.

Please present this bond for payment, or if you prefer, take it to your bank, endorsed by yourself before witness, together with the enclosed affidavit properly executed before a notary, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America, Los Angeles.

This, however, is subject to your immediate acceptance.

Yours very truly,
INVESTMENT FINANCE
COMPANY
By C. L. CRONK.'

Reading plaintiff's Exhibit No. 166, a letter on the [487] letterhead of the Investment Finance Company, 415 South La Brea Avenue, Los Angeles, California, dated October 31, 1938, addressed to Mrs. D. P. Talamantes, 1820 Acacia Street, Alhambra, California:

'Dear Madam:

The undersigned is completing his work in connection with the liquidation of the

(Testimony of Della P. Talamantes.)

First Security Deposit Corporation on November 25, 1938. Under the circumstances, this will be my last communication to you in connection with this matter.

You hold a collateral trust bond of the First Security Deposit Corporation, No. A-2463, in the principal amount of \$387.23, under the name of Jack Winston, a minor.

I am in a position to make you an offer of \$329.14 for said bond, provided the sale is consummated on or before November 15, 1938.

Either communicate directly with me, or send the bond properly endorsed, together with the enclosed affidavit properly executed by a notary, to the Dunsmuir and Wilshire branch of the Bank of America, of this city, and a draft in the above amount will be honored.

Yours very truly,

C. L. CRONK.' " [488]

The witness further testified: That she did not finally sell her securities to the Investment Finance Company, or the First Security Deposit Company. That she does not remember receiving any correspondence or word from either the First Security Deposit or the Investment Finance Company calling in her securities subsequent to the receipt of the last letter, Plaintiff's Exhibit 166, dated October 23,

(Testimony of Della P. Talamantes.)

1938. I do not now have my securities. I collected it. It was paid. The bond matured and was paid. I received the face value of my security.

(It was stipulated that the bond referred to by the witness was called in and paid, in the manner she testified to, on May 2, 1939.)

F. W. KIDDER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a Doctor with offices in the Pacific Electric Building; I was an investor in the Railway Mutual Building and Loan Association; while an investor there I exchanged my securities for the First Security Deposit Corporation. I don't remember the certificates, just the number of bonds I received. I have 30 shares of common stock and the amount of bonds I only remember by the price I sold them for.

"Mr. Butler: I object to the testimony of this witness on the ground that it is hearsay and incompetent as to the defendant Cronk; and I take it that that is a running objection to all of his testimony while he is on the stand.

The Court: It may be deemed to be the subject of such [489] objection, and the objection is overruled; the same ruling.

Mr. Irwin: And the objection of immaterial.

(Testimony of F. W. Kidder.)

The Court: The same objection as to all defendants.

Mr. Adams: And we have the running objection of hearsay, and not material to the defendant Cronk?

The Court: That is correct."

The witness was shown a form letter dated November 15, 1932, signed "First Security Deposit Corporation, C. E. Perkins." And a copy of a letter dated December 22, 1937, signed "Investment Finance Company, by C. L. Cronk," and asked whether or not he received the original of said letter, and answered, "I wouldn't know, it has been a long time ago and I can't remember. I know I received some letters but I wouldn't remember as to the particular ones."

The witness further testified: That he received some offers to buy his securities. That he did not recall from whom the offers were received. That he threw it in the waste paper basket with other advertisements.

The witness further testified: That a person purporting to represent either the Investment Finance Company, or the First Security Deposit Corporation called at his office. That he did not remember the date or the year, or the party's name. That he knows the defendant Joseph L. Smale.

The witness further testified: I had a conversation with Mr. Smale but I don't remember if it had any reference to this time of the letter; I don't re-

(Testimony of F. W. Kidder.)

member where the conversation was held. As far as I remember, no one else was present. I asked him a question about securities. I asked him if he thought it would be well to sell them. He said it was up to me, but he thought it would probably be a good plan to keep them. I finally sold my securities, but I don't know who I sold them to.

The witness further testified: That the endorsement on the [490] check, plaintiff's Exhibit 186 for identification, was his. That it must be the check he received for the sale of his securities. That he thinks the check was given to him in his office by Mr. Cronk.

(Said check was received in evidence over the objection of the defendants, that no proper foundation was laid for its introduction. Said exhibit was marked plaintiff's Exhibit 186 for identification, and separately certified pursuant to stipulation and order of Court.)

The witness further testified: That he did not know the name of the person who delivered the check to him; the check was delivered to me in my office. If his signature is on it, I suppose he is the man I don't know. I did not prior to the receipt of that check have any conversation with C. L. Cronk.

"Mr. Crawford: At this time we wish to read from plaintiff's Exhibit 45, which is the purchase order of the Investment Finance Company, reading from page No. 1033:

(Testimony of F. W. Kidder.)

'Purchase Order, Investment Finance Company, 415 South La Brea Avenue, Los Angeles.

To Dr. F. W. Kidder.'

In the first column 'A-1215; quantity wanted, 700; description, full paid—prior; price \$560; unit No. 80;

A-2247; quantity wanted, \$26.63; accumulative—prior; price, \$21.30; unit, 80.

A-5175; quantity wanted, 100; full paid—non-prior,' with the initial of 'F. W.'; price, \$80; unit, 80.

A-6971; quantity wanted, 60; cumulative—non-prior; \$48; unit, 80.

A-738; two shares preferred A; price \$4; unit \$2;

B-310; 40 shares preferred B; price \$80;

B-308; wanted 10 shares preferred B; Ralph G. Gordon and Mrs. Clayton Kidder; price, \$20; [491]

A-2057; quantity wanted, \$215.87; cumulative—non-prior.' And the name is 'Bessie Chobotsky; \$172.96.'

There is one correction. Where I read the initials 'F. W.,' that is followed by the name 'Kidder.'

'September 14, 1938, Cronk; check No. 244.'

'The initials are 'E. C. T.,' 'J. A. T.,' and 'R. W. S.'

(Testimony of F. W. Kidder.)

Will it be stipulated that those are the initials of the defendants?

Mr. Irwin: So stipulated, subject to correction. 'R. W. S.' is Mr. Starr, 'E. C. T.' is Mr. Thomas."

GRACE G. BENN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I was an investor in the Railway Mutual Building and Loan Association.

"Mr. Adams: May we get in our regular objections your Honor, on the grounds of hearsay and non-materiality * * * * ?

The Court: As to all defendants same objections, same ruling and exception.

Mr. Irwin: May the same understanding be had with this witness as the objections made at the start, go all the way through with her testimony.

The Court: Very well."

The witness further testified: That she received plaintiff's Exhibit 187 for identification, a letter dated November 15, 1932, through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and [492] marked plaintiff's

(Testimony of Grace G. Benn.)

Exhibit 187, to which ruling of the Court, the defendants duly noted an exception.)

"Mr. Crawford: At this time I will read to the jury plaintiff's Exhibit 187, which is a letter on the letterhead of the First Security Deposit Corporation:

'First Security Deposit Corporation
Suite 323 Pacific Electric Building
Sixth and Main Streets
Los Angeles, California

November 15, 1932

Grace G. Benn:

We hand you herewith securities of this corporation as follows:

A-46 3 shares \$60.00

A-6048 Cumulative 221.66

These securities are delivered to you by this corporation on behalf of the Trustees under the Plan and Agreement and Declaration of Trust for the Reorganization of The Railway Mutual Building and Loan Association, dated November 27, 1931, and in conformity with said Plan and Agreement and Declaration of Trust, and your acceptance of these securities shall constitute delivery as contemplated under said Plan and Agreement and Declaration of Trust, and your acceptance of these securities shall constitute delivery as con-

(Testimony of Grace G. Benn.)

templated under said Plan and Agreement and Declaration of Trust:

Please return to us immediately the following:

1. The Trustees' Certificate (s) of Deposit which you now hold.
2. The enclosed identification card COMPLETELY filled out.

IMPORTANT:

The blue identification card is for your protection. Be sure to write your mother's maiden name in the [493] space provided for password.

Your signature (s) on the line provided at the bottom of the card must be exactly as written at the top of the card.

The Certificate (s) of Deposit and identification card above referred to MUST BE RETURNED TO US PROMPTLY as it is our only means of recognizing you for the payment of interest or dividends, or for the transfer of your securities. Envelope, properly stamped and addressed, is enclosed herewith for your use in returning same.

Very truly yours,

FIRST SECURITY DEPOSIT
CORPORATION

C. E. PERKINS, Treasurer."

The witness further testified: That she received

(Testimony of Grace G. Benn.)

plaintiff's Exhibit 188 for identification along with the letter, plaintiff's Exhibit 187; that that card bears her signature in the right hand corner; that she returned the card in accordance with the instructions in the letter, plaintiff's Exhibit 187.

(Said card was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 188, to which ruling of the Court, the defendants duly noted an exception.)

"Mr. Crawford: At this time I will read to the jury plaintiff's Exhibit 188:

'First Security Deposit Corporation

Name: Grace G. Benn The date: December 1, 1932.

Addressed: 2511 South Bronson, Los Angeles.'

I will omit the identification.

'Securities: A-46 — A-6048.'

I hereby submit the foregoing for the purposes of [494] identification, and subscribe to the declarations and proxy printed on the reverse of this card.

'Grace G. Benn.

2511 South Bronson Avenue

L. A.

Witness: B. G. Stevens.

5459 Brynurst Avenue, L. A.'

And on the reverse side thereof the following:

(Testimony of Grace G. Benn.)

'Joint tenancy: The securities of the First Security Deposit Corporation listed on the reverse side of this card are owned by the undersigned as joint tenants, and all monies credited to these securities, or any of them, or heretofore issue or credited, shall be received by the First Security Deposit Corporation under this declaration of joint tenancy, and by mutual agreement between each and all of us the receipt or acquaintance of any one of the undersigned shall be valid, and sufficient relief and discharge of the First Security Deposit Corporation of its obligations and accords under said securities. At the death of a joint tenant herein named, the First Security Deposit Corporation shall be notified at once, and the survivor or survivors must obtain the consent in writing of the State Comptroller or the County Treasurer to the delivery or transfer of such securities, the benefits and rights to the survivors, or survivor.

Proxy: I hereby appoint R. W. Starr, J. L. Smale, and E. C. Thomas, or any two of them acting in accord, as by proxy to vote my shares at all meetings at which I am not present, or have a subsequent proxy, for a period of seven years, unless revoked earlier. Those statements or conditions, verbal or written, other than here-

(Testimony of Grace G. Benn.)

in provided, shall be binding on the corporation."

The witness further testified: That she received plain- [495] tiff's Exhibit 189 for identification through the mail.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 189.)

The witness further testified: That she received plaintiff's Exhibit 156 for identification through the mail at the house to which it is addressed; that it was in a sealed envelope.

(Said letter was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 156.)

The witness further testified: That she received plaintiff's Exhibit 163 for identification through the mail; the witness was asked whether or not the envelope, plaintiff's exhibit 163-A for identification, was the one in which the letter, plaintiff's exhibit 163 for identification, was received in, and answered that it was one of the envelopes she received. That all the letters came in envelopes similar to that.

(Said documents were received in evidence over the objection that the same were immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibits 163 and 163-A respectively.)

(Testimony of Grace G. Benn.)

The witness further testified: I had a number of telephone calls regarding the selling of my securities, but I don't recall just when they were. I couldn't tell you at any particular date. They were telephone conversations. The party called me. The conversations were off and on for about two years. That she had no conversation with Mr. Cronk after the receipt of the last letter, until she went to the office to sell her stock, but did write him a letter. I answered that letter by a letter. When I decided to sell my securities, I went over to the address on La Brea Street [496] and this party was in the office and I sold my securities that afternoon. You may think that I meant Mr. Cronk was in the office, but it was another party. I don't recall that I ever saw Mr. Cronk. I didn't see any of them connected with the association only that one time and that is the day that I went out there. I think the gentleman I talked to that time was Mr. Ireland. At that time I discussed the purchase of my securities.

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

(Testimony of Grace G. Benn.)

The Witness: No.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so. I just saw him the one time.

Mr. Lawson: May the record show that is Mr. Ireland.

The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, your Honor.

The Court: Stand up again. Is that the man you talked to, if you know?

(The Defendant Ireland arose, as requested.)

The Witness: No, I don't think so."

The witness further testified: That after she had this conversation, she sold her securities. That plaintiff's exhibit No. 190 for identification, a check dated December 15, 1938, payable to herself in the sum of \$194.41, signed, "Investment Finance Company, by A. R. Ireland," bears her endorsement signature. That was [497] the check she received at the time in payment for her securities.

(Said check was received in evidence over the objection that the same was immaterial, hearsay and no foundation laid, and marked plaintiff's Exhibit 190.) [498]

"Mr. Crawford: At this time, I want to read to the jury plaintiff's Exhibit 45, page

(Testimony of Grace G. Benn.)

1076 of the purchase order of the Investment Finance Company, page 1076.

'Purchase Order, Investment Finance Company,

'415 South La Brea Avenue,

'Los Angeles, California

'To Grace Benn:

'A-6048; quantity wanted 221.66; cumulative—non prior; price, 188.41; unit, 85.'

'A-46; 3 shares Preferred A; price, \$6.00; unit \$2.00.' Dated 12/15/38; check No. 2294, Ireland check, with the initial 'R. W. S.; J. H. E., E. C. T.'

(A stipulation was entered into that the bonds sold by witness of the plaintiff had not yet matured at the time of their sale.).

FRED O. MORSE

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am a retired railroad man. Prior to 1932 I was an investor in the Railway Mutual Building and Loan Association.

"Mr. Butler: At this time I object——

The Court: The same objections that have been made to the other investors who have been on the stand may be deemed to have been

(Testimony of Fred O. Morse.)

made to the testimony of this witness; the same ruling; same exception; same reservation as to the motion to strike. For all defendants.

Mr. Butler: A running objection.

The Court: Yes. The objection is hearsay; it is not material; it hasn't been properly connected up.

Mr. Irwin: And the additional one, your Honor, that there has been no foundation laid.

The Court: That the corpus delicti has not been shown, yes. [499]

The witness further testified: That he received a document entitled "Plan and Agreement of Reorganization," similar to plaintiff's Exhibit 131 through the mail; I don't remember the date I remember the date I received one of those.

The witness further testified: That he received a letter through the mail dated December 10, 1931 on the letterhead of the reorganization committee identical with that of plaintiff's Exhibit 132.

The witness further testified: That he received a letter on the letterhead of the Railway Mutual Building and Loan Association dated December 15, 1931 addressed to "All Members" identical with that of plaintiff's Exhibit 133.

The witness further testified: That he received a letter dated April 4, 1932 and a letter dated October 5, 1932, both on the letterhead of the First Security Mortgage Corporation through the mail and that said letters so received by him were respectively identical with plaintiff's Exhibits 134 and 135.

(Testimony of Fred O. Morse.)

The witness further testified: That after receiving the document headed "Plan and Agreement of Reorganization for the Railway Mutual Building and Loan Association," plaintiff's Exhibit 131, he exchanged the securities which he held in the Railway Mutual Building and Loan Association for securities of the First Security Deposit Corporation; that he received the original of plaintiff's Exhibit 191 for identification, a letter dated November 15, 1932 and that at the time of the receipt of that letter he received the securities referred to in the letter. (Said letter was received in evidence and marked plaintiff's Exhibit No. 191. Said letter is a form letter similar to that of plaintiff's Exhibit 187).

The witness further testified: That accompanying the letter, plaintiff's Exhibit 191, was a blue identification card similar to that contained in plaintiff's Exhibit 34 and thereafter signed the card and mailed it to the First Security Corporation on or about December 7, 1932. (The card referred to as a part of [500] plaintiff's Exhibit 34 was then separately identified and received in evidence as plaintiff's Exhibit 192). Said exhibit is separately certified pursuant to stipulation and order of Court.)

The witness further testified: That he received plaintiff's Exhibit 193 for identification, a letter dated July 17, 1937, on the letterhead of the First Security Deposit Corporation, through the mail. (Said letter was offered and received in evidence and marked plaintiff's Exhibit No. 193. Said Ex-

(Testimony of Fred O. Morse.)

hibit is identical with plaintiff's Exhibit 184 hereinabove set forth.)

The witness further testified: It is my recollection that following receipt of plaintiff's Exhibit 193 I personally had a conversation with the defendant C. L. Cronk at my home. Besides myself, my wife was present. The substance of the conversation was that the company would have to liquidate the—what shall I call it—the bonds or the assets of the company in order to complete the work that they were organized for. As I understand that, the liquidation of the assets of the company; he told me that probably holding the bonds until 1942 when they would become payable, that possibly we wouldn't be able to realize the amount of the bonds; that was the gist of the conversation. I recall nothing else that he said particularly.

"Q. Do you recall whether or not anything was said relative to the company operating at a profit or loss.

Mr. Butler: I object to that on the grounds that it is leading and suggestive.

The Court: Overruled.

Mr. Lawson: Exception.

The Witness: I assume you mean by that whether they were making money or were not making money.

Mr. Campbell: That is right.

The Witness: I have told you the gist of the conversation.

(Testimony of Fred O. Morse.)

Mr. Campbell: What was said in that regard?

A. That the company was operating at a loss.

Q. What did Mr. Cronk tell you about operating at a loss? [501]

A. That the expenses were accumulating faster than the income.

The witness was again asked whether or not anything was said relative to the ability of the company to pay the face amount of the bonds, and answered:

"I think I have already stated that the possibility of the bonds not being paid in full at the expiration of the time. Mr. Cronk came to my house a second time. I received no correspondence between his first and second visit. No one but my wife was present at the time of this second conversation with Mr. Cronk. My recollection of this conversation is that Mr. Cronk said that the company could handle the bonds better than an individual could and get more out of them. I recall no offer being made in these conversations for the purchase of my bonds; the only offer was written in the letter, plaintiff's Exhibit 158 for identification. I received plaintiff's Exhibit 158 for identification through the mail; it was contained in an envelope which was addressed to me and my best recollection is there was a cancelled postage

(Testimony of Fred O. Morse.)

stamp on the envelope." (Said letter was received in evidence and marked plaintiff's Exhibit 158).

"Mr. Campbell: Reading from this letter (Exhibit 158) on the letterhead of the Investment Finance Company, June 28, 1938:

"Fred O. Morse
1312 Bates Avenue
Los Angeles, California.

'Dear Sir:

'You hold securities of the First Security Deposit Corporation now in process of liquidation, Bond No. A-1260 in the amount of \$1000; A-2309, amount \$100; and we are able at this time to obtain for you \$825 [502] on same.

'Please present these bonds for payment, or if you prefer, take them to your bank, endorsed by yourself before witness and draw a draft on us for this amount through the Dunsmuir-Wilshire Branch of the Bank of America.

'This, however, is subject to your immediate acceptance.

'Yours very truly,

'INVESTMENT FINANCE
COMPANY

'By C. L. CRONK.'

Written in ink at the bottom of the letter, 'If

(Testimony of Fred O. Morse.)

you wish any more information, let me know when I can see you. C. L. C.'

The witness further testified: I received plaintiff's Exhibit 161 for identification through the mail; it was contained in an envelope addressed to me at the address shown in the letter; presumably there was a cancelled postage stamp on such envelope; that is my best recollection; I did not preserve the envelope in which the letter was received. Neither did I preserve the envelope in which plaintiff's Exhibit 158 was received. (Said letter was received in evidence and marked plaintiff's Exhibit 161).

"Mr. Campbell: Reading from plaintiff's Exhibit 161, on the letterhead of the Investment Finance Company, July 25, 1938.

'Mr. Fred O. Morse
'1312 Bates Avenue
'Los Angeles, Calif.

'Dear Sir:

'Will you be kind enough to extend to me the courtesy of an interview at your early convenience. [503]

'For your own information, I think this would be advisable.

'Thanking you in advance for the favor,
I am

'Very truly yours,
'INVESTMENT FINANCE
COMPANY
By C. L. CRONK.'

(Testimony of Fred O. Morse.)

The witness further testified: That he did not have a further interview with Mr. Cronk after receiving plaintiff's Exhibit 161; that he had no further conversations with Mr. Cronk according to his recollection. I received the letter, plaintiff's Exhibit 164 for identification, through the mail; it was contained in an envelope addressed to me at the same address as shown in the letter. I don't recall if there was a cancelled postage on that envelope to the best of my recollection; presumably there was; I did not preserve the envelope. The letter referred to was received in evidence and marked plaintiff's Exhibit 164.)

The witness further testified: That he received the letters, plaintiff's Exhibits 194, 195, 196 and 197 for identification through the mail. (Said letters were received in evidence and marked plaintiff's Exhibits 194, 195, 196 and 197 respectively).

The witness further testified: That he did not accept any of the offers set forth in the letters plaintiff's Exhibits 194 to 197, inclusive. [504]

"Mr. Campbell: Reading first from plaintiff's Exhibit No. 194, on the letterhead of the Investment Finance Company, October 8, 1937:

(Testimony of Fred O. Morse.)

'Mr. Fred O. Morse
1412 Bates Avenue
Los Angeles, Calif.

Dear Mr. Morse:

'According to the records of the First Security Deposit Corporation, you hold Bond No. A-1260 in the amount of \$1,000.00, Bond A-2309 amount \$100.00 and Certificate A-832 for eighteen shares Preferred, and we are able at this time to obtain for you \$806.00 on same.

Please present these for payment, or, if you prefer, take them to your bank, endorse by yourself before witness, and draw a draft for this amount on us through the Dunsmuir and Wilshire Branch of the Bank of America.

This, however, is subject to your acceptance within ten days.

Yours very truly
INVESTMENT FINANCE
COMPANY
By C. L. CRONK.'

Plaintiff's Exhibit 195, dated November 1, 1937, on the letterhead of the Investment Finance Company, 415 South La Brea Avenue, Los Angeles.

(Testimony of Fred O. Morse.)

'Mr. Fred O. Morse
1312 Bates Avenue
Los Angeles, California

Dear Sir:

You hold securities of the First Security Deposit Corporation, Bond No. A-1260 in the amount of \$1,000.00, Bond A-2309 amount of \$100.00, Certificate A-832 for eighteen shares Preferred, [505] and we are able at this time to obtain for you \$806.00 on same.

Please present these for payment, or if you prefer, take them to your bank, endorse by yourself before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America.

This however, is subject to your acceptance within ten days.

Yours very truly

INVESTMENT FINANCE
COMPANY
By C. L. CRONK.'

Plaintiff's Exhibit No. 196 upon the letterhead of Investment Finance Company, dated December 31, 1937.

'(Testimony of Fred O. Morse.)

'Mr. Fred O. Morse
1312 Bates Avenue
Los Angeles, California

Dear Sir:

You hold securities of the First Security Deposit Corporation, Bond No. A-1260, in the amount of \$1000.00, Bond No. A-2309 amount \$100.00, and Certificate A-832 for eighteen shares Preferred, and we are able at this time to obtain for you \$806.00 on same.

Please present these securities for payment, or if you prefer, take them to your bank, endorse by yourself before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America.

You will recall that the First Security Deposit Corporation was organized to liquidate a large portion of the assets of the Old Railway Mutual Building and Loan Association over a period of time to the best advantage of the depositors. It is my understanding had this not been done, the situation would in all probability]506] have been liquidated under a forced liquidation with its incidental low prices by the building and loan commissioner.

Furthermore, I feel that the gentlemen who have had charge of this corporation

(Testimony of Fred O. Morse.)

- have done a splendid piece of work in bringing about a condition where we are able to obtain seventy cents on the dollar for the bonds.

In other words, you can obtain \$806.00 for your holdings, or wait approximately six and one-half years and take your chances on securing more out of what is left of the assets after over \$900,000.00 has already been liquidated.

This offer is good until February 1st, 1938.

Yours very truly,

INVESTMENT FINANCE
COMPANY

By C. L. CRONK.'

Government's Exhibit 197, on the letterhead of Investment Finance Company, dated April 19, 1938.

"Fred O. Morse

"1312 Bates Avenue

"Los Angeles, California

"Dear Sir:

"You hold securities of the First Security Deposit Corporation, Bond No. A-1260 in the amount of \$1,000.00, A-2309 amount \$100.00 and Certificate A-832 for eighteen shares Preferred, and we are able at this time to obtain for you \$751.00 on same.

(Testimony of Fred O. Morse.)

"Please present these securities for payment, or if you prefer, take them to your bank, endorse by yourself before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America.

"This, however, is subject to your acceptance within thirty days.

"Yours very truly,

"INVESTMENT COMPANY
COMPANY

"By C. L. CRONK."

Plaintiff's Exhibit 158, on the letterhead of Investment Finance Company, dated June 25, 1938.

'Fred O. Morse
1312 Bates Avenue
Los Angeles, California

Dear Sir:

You hold securities of the First Security Deposit Corporation (now in process of liquidation), Bond No. A-1260 in the amount of \$1000.00, A-2309 amount \$100.00, and we are able at this time to obtain for you \$825.00 on same.

Please present these bonds for payment, or if you prefer, take them to your bank, endorse by yourself before witness and draw a draft on us for this amount through

(Testimony of Fred O. Morse.)

the Dunsmuir and Wilshire Branch of the
Bank of America. [507]

This however, is subject to your immedi-
ate acceptance.

Yours very truly,

INVESTMENT FINANCE
COMPANY
By C. L. CRONK.'

Written in pen: 'If you wish any more
information, let me know when I can see
you. C. L. C.'

Plaintiff's Exhibit 164, upon the letterhead
of the Investment Finance Company, dated
October 26, 1938.

'Mr. Fred O. Morse
1312 Bates Avenue
Los Angeles, California

Dear Sir:

The undersigned is completing his work
in connection with the liquidation of the
First Security Deposit Corporation on No-
vember 25th, 1938. Under the circum-
stances, this will be my last communication
to you in connection with this matter.

You hold collateral trust bonds of the
First Security Deposit Corporation, Nos.
A-1260 in the principal amount of \$1000.00,
and A-2309 in the amount of \$100.00, to-
gether with eighteen shares of Preferred
stock of said corporation.

(Testimony of Fred O. Morse.)

I am in a position to make you a total offer of \$971.00 for said securities, provided the sale is consummated on or before November 15th, 1938.

Either communicate directly with me, or send your securities properly endorsed to the Dunsmuir and Wilshire Branch of the Bank of America, this city, and a draft on us in the above amount will be honored.

Yours very truly

C. L. CRONK.' " [508]

The witness further testified: I received a letter from the corporation in June or July of 1939 stating that if I wished to turn in the bonds I would receive face value and interest to date. The letter I refer to is plaintiff's Exhibit 198 for identification. The date of that letter, July 7, 1939, refreshes my recollection as to the time I turned in my bonds. I received on that occasion the full face value plus interest for my bonds.

Cross Examination

By Mr. Irwin:

(Upon request the plaintiff produced a check dated August 9, 1939).

"Q. May I show to the witness a check, on it bearing the notation 'First Security Deposit Corporation,' dated August 9, 1939. May I direct the witness' attention to the endorsement on the back? I will ask you if that is your signature.

(Testimony of Fred O. Morse.)

A. That is my signature."

(The check was received in evidence and marked defendant's Exhibit J).

"Mr. Irwin: Check of the First Security Deposit Corporation of August 9, 1939, 'Pay to the order of Fred O. Morse, \$1,172.92, First Security Deposit Corporation, by J. Howard Edgerton and Louise Phillips.'

And under 'Description, date and amount,' appears the following: 'Bond A-1260, \$1,000, interest \$35; Bond A-2309, \$100, interest \$37.92; total \$1,172.92.'

Bearing the endorsement, as heretofore identified, and the cancellation as having been paid on August 11, 1939."

The witness further testified: That he did not sell his 18 shares in the First Security Deposit Corporation, but still retains them. [509]

AUDRA D. JONES

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am the widow of Herbert C. Jones; prior to 1932 my husband and myself held certain securities of the Railway Mutual Building and Loan Association; we thereafter exchanged its securities for securities of the First Security Deposit Corpora-

(Testimony of Audra D. Jones.)

tion. The witness' attention was directed to a blue card, plaintiff's Exhibit 34, and testified that her signature appeared thereon. She does not remember when she received the card and signed the same.

Upon objection being made, the court stated:

"The same objection heretofore made to the testimony of these other investors may be deemed to be made as to all defendants at this time, and the same ruling."

The witness further testified: That she received the card and signed it somewhere along the time that it bears date. That her best recollection is that after signing the card, she forwarded it to the First Security Deposit Corporation.

"Q. Mrs. Jones, did you hold, you and your husband, the following securities of the First Security Deposit Corporation: No. A-798 for twelve shares of preferred A stock; No. A-6967 accumulative bond six year maturity, \$1,005.49; No. A-2239 accumulative bond six year maturity, \$4,242,

A. I think that is right."

The witness further testified: I received a letter in August 1937 asking me to call at the office and talk it over with them; I don't think I preserved that letter; as near as I can remember, the letter was signed by Mr. Cronk. After receiving the letter I went to the offices of the company out on La Brea. On the occasion I went to the offices of the company, I sold my securities. The witness

(Testimony of Audra D. Jones.)

was shown plaintiff's Exhibit 199 for identification, a check dated August 4, 1937 and signed "C. L. Cronk" [510] and testified that her endorsement appeared on the reverse side of the check; that she received the check on the date it bears. The check was received in payment for her securities; that was the full amount which she received. On the occasion I went to the offices and on which occasion I received this check I had a conversation with a man whom I supposed was Mr. Cronk.

"Q. Do you recognize the gentleman in the court room with whom you had conversation on that occasion?

A. I don't think I would.

Q. Well, will you look about the court room and see if you see him here?"

Thereupon the court directed each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had the conversation and the witness in each instance replied "No" or "I don't think so."

MARY WISELEY

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am the widow of George Wiseley; prior to 1932 my husband and I owned securities of the Railway Mutual Building and Loan Association;

(Testimony of Mary Wiseley.)

thereafter we exchanged them for securities of the First Security Deposit Corporation. They consisted of five bonds of \$500.00 each; and then there was one called a note, a 12-month note for \$50.73. I recall that the five \$500.00 bonds had a maturity date of November 1, 1942 and that the \$50.73 note had a maturity date of August, 1935.

"Mr. Adams: This is a new witness. At this time we wish to make our usual objection of hearsay and not material to the issues.

The Court: The objections may be deemed to be made; same ruling; as to all defendants.

[511]

Mr. Irwin: Exception."

The witness further testified: That the \$50.73 note maturing in August 1935 was paid in full plus interest. That she subsequently disposed of her five \$500.00 bonds in the early part of 1938, to the First Security Mortgage Deposit Corporation; that at the time she disposed of them she received a check; that the check dated April 6, 1938, signed "C. L. Cronk" bore her endorsement. Plaintiff's Exhibit 201 for identification, a check for \$1,875 is the check she received on or about April 6, 1938 for her bonds; that is the total amount she received. (Thereupon said check was received in evidence and marked plaintiff's Exhibit 201 for identification. Said check is separately certified pursuant to stipulation and order of Court.)

The witness further testified: I have known Dr.

(Testimony of Mary Wiseley.)

Starr a good many years. Prior to my disposition of my bonds in the sum of \$1875 I had a conversation with Dr. Starr relative to the sale of my bonds. There was more than one conversation. The first conversation was quite a number of months before the sale. It was in Dr. Starr's office. I and my husband were patients of Dr. Starr. No one was present besides myself and Dr. Starr.

"Q. Will you relate what was said on that occasion with relation to the sale of your bonds? Stating in substance, if you do not recall the exact words.

A. Well, the wording was that they would offer me so much on the dollar.

Q. What did Dr. Starr say in that regard?

A. He said, 'I would take that, if I were you.'

Q. What figure was said?

A. That was 75 cents on the dollar.

Q. What did he say about your taking it?

A. Well, he said his advice to me would be to take it, that he had a sister who was in the same thing, ad he ad- [512] vised her to take it, 75 cents on the dollars."

The witness further testified: At that time Dr. Starr stated they were going to liquidate; that I had better take the 75c because they were going to liquidate; that they felt they couldn't go on and pay the amount of interest; that they would

(Testimony of Mary Wiseley.)

have to liquidate. I had quite a number of conversations with Dr. Starr trying to see if I could get more than 75c. On these occasions I would say that I brought up the subject of the sale of my bonds because I was most interested in it. I am acquainted slightly with the defendant Twombly. I have only seen him in the office; it was probably a couple of months before I sold my bonds. I went to the office to talk to Mr. Twombly. Mr. Twombly simply said that he would advise me to take what was offered to me; that they wanted to liquidate and it might be that I would not do so well if I kept holding the bonds; it might be I couldn't get that much. I am only acquainted with the Defendant Cronk in a business way; he was the one that came to my house. The first occasion he came to my house was quite a few weeks or months prior to my selling the bonds; in that conversation he said the same as the others; advised me to accept this and was very anxious for me to accept it—that is what he stated. Mr. Cronk came to my house several times and called me over the telephone. The conversation was substantially the same on each occasion. I had a conversation with Mr. Cronk on the day I sold my bonds, and he said he couldn't advise me to hold on; that they were trying to get things straightened up to liquidate. I surrendered my securities on that day and received a check for \$1875.

"Mr. Campbell: I will read from Government's Exhibit 45.

(Testimony of Mary Wiseley.)

'Purchase Order Record, Investment Finance Company. Order No. 971,' dated April 6, 1938.

'Mary L. Wiseley, A-1499; quantity wanted, [513] 2500; full paid—prior; price, \$1875.00; unit price \$75; 4-6-38; Cronk, Check No. 216,' and the initials of 'C. W. T., E. C. T.,' and 'R. W. S.'"

Cross Examination

By Mr. Irwin:

The witness testified that defendant's Exhibit K for identification bore her signature.

"Mr. Irwin: May the record show that I have directed the witness' attention to Defendant's Exhibit K, which is two certificates of deposit of the Railway Mutual Building and Loan Association, No. 1299, and No. 1300, bearing date of March 5, 1932.

The endorsement on the back bears the date of December 13, 1932."

(It was thereupon stipulated that defendant's Exhibits K and L for identification were interim certificates used after the date of deposit of the securities of the Railway Mutual and Loan Association and prior to the issuance of the securities of the First Security Deposit Corporation; that they are certificates of deposit received by the witness upon her depositing with the trustee the securities set forth in the certificates.). (Said documents were received in evidence and marked de-

(Testimony of Mary Wiseley.)

fendant's Exhibits K and L. Said exhibits are separately certified pursuant to stipulation and order of Court.).

The witness further testified: The \$50.00 note was paid with whatever interest was due on it quite some time prior to the transaction in connection with the sale of the five \$500.00 bonds. I received interest on these bonds at the rate of 6%. I received this interest from the First Security from the time the bonds were issued, twice a year right up to the time I sold them. (It was stipulated that the records reflect that the maturity date of the five \$500.00 bonds of this witness was November 1, 1942).

"Mr. Lawson: In connection with the last witness, Mr. [514] Campbell gave me these certificates of deposit relative to Herbert C. and Audra D. Jones, and I would like to have those marked for identification." (Thereupon said documents were marked defendant's Exhibit M-1 to M-6 inclusive for identification.)

LELAND H. BIDLEMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Prior to 1932 I was a depositor and security holder of the Railway Mutual Building and Loan Association.

(Testimony of Leland H. Bidleman.)

“The Court: Same objections as to this testimony on behalf of all the defendants may be deemed to have been made; the same ruling; subject to the same motion to strike.

Mr. Irwin: Exception.”

The witness further testified: That thereafter he exchanged securities which he had in the Railway Mutual Building and Loan into securities of the First Security Deposit Corporation; that his investment in the Railway Building and Loan Association was \$16,224.82; that in exchange he received from the First Security Deposit Corporation certificates and shares of stock in the same amount; that he has a record of the certificate numbers together with the amounts.

“Q. Will you state that?

A. A1053, 5000, 700; A 1044, 3000; A 5010, \$4,100.00; A 5011, 1600; that makes a total of \$14,400.00. Then I had—

Q. Just a moment. Were all of those, which you have just described there, given to you in bonds?

A. They were in bonds, some of those were bonds, yes.

Q. Proceed. What other securities were you given?

A. A 48, 55 shares, that come to \$1100.00; A 67, 3 shares, \$60.00; A 4920, 20 shares, \$400.00, \$20.00 a share, 78 shares.” [515]

The witness further testified: That the total of

(Testimony of Leland H. Bidleman.)

the securities that he received from the First Security Deposit Corporation as shown on their face was \$16,224.82. I received plaintiff's Exhibit 162 for identification, a letter dated July 27, 1938 through the mail. At the time I received the letter it was enclosed in an envelope addressed to me at the address shown on the face of the letter; the envelope was post marked. I do not now have that envelope.

"Mr. Campbell: This will be offered as plaintiff's Exhibit 162.

Mr. Irwin: Your Honor, in addition to the other objections, that letter there was identified some time ago, I don't know whether we have the objections of materiality, and the foundation, as to this, or not."

"The Court: That objection will be deemed to be made on behalf of all the defendants, overruled, exception allowed, subject to a motion to strike.

Mr. Campbell: Reading plaintiff's Exhibit 162, on the letterhead of the Investment Finance Company, July 27, 1938:

'Mr. Leland H. Bidleman

'Route No. 2

'Little Falls, New York

'Dear Sir:

'Supplementing previous correspondence regarding the bonds and Preferred stock of the First Security Deposit Corporation which you hold, I am somewhat at

(Testimony of Leland H. Bidleman.)

a loss to understand why you have not written me, and thought perhaps you did not understand the situation.

'In the first place, the First Security Deposit Corporation was organized in 1932 to handle the liquidation of the assets of the old Railway Mutual Building and Loan Association, and it is my understanding [516] had this not been done, the assets would have been liquidated by a receiver appointed by the building and loan commissioner at that time.

'This corporation is now in the final stages of this liquidation. Special arrangements were made whereby we could obtain for you and Mr. Hicks the amount stated in my former letter. It gives you eighty cents on the dollar on the bonds and two dollars per share for the Preferred stock, which of course is secondary to the bonds. These bonds are due in 1942, and under the trust indenture they have an additional eighteen and four months or twenty-two months which would be about the middle of 1944.

'In my opinion, the thing for you to decide is whether it would be to your advantage to cash these bonds at eighty cents or wait that length of time with the chance of realizing any more out of what is left of the assets after more than one million

(Testimony of Leland H. Bidleman.)

dollars worth of assets has been liquidated. It is my understanding further that such an amount of the assets have been disposed of to the extent that the income has been cut down where it is insufficient to meet the monthly operating over-head. Consequently, it seems to me that the smart thing to do is to complete the liquidation as soon as possible, rather than continue another six years with a monthly operating deficit, and it is due to this condition that we are able to obtain this price for your bonds, as you are one of the few remaining large holders.

'If this does not explain the matter satisfactorily, please let me know, and if the offer is acceptable you may endorse the securities as indicated in my recent letter and draw a draft on the Investment Finance Company accordingly. [517]

'In any event, the expression of your wishes in the matter will be greatly appreciated.

'Yours very truly,
INVESTMENT
FINANCE COMPANY
'By C. L. CRONK'"

The witness further testified that plaintiff's Exhibit 202 for identification, a telegram, was received by him on the date it bears, October 17, 1938.

(Testimony of Leland H. Bidleman.)

"Mr. Campbell: As plaintiff's Exhibit 202A, I will offer a copy of the same telegram, to which is attached a pencil copy of the same telegram, bearing the signature 'C. L. Cronk', and the initials 'O. K., J. A. T.' under our stipulation as to signatures and initials.

I will offer this as plaintiff's Exhibit 202A so that it may bear the same number.

I will now offer the first document in evidence as plaintiff's Exhibit 202.

The Court: It may be received and so marked.

(Plaintiff's Exhibit No. 202 and 202A were received in evidence.)

Mr. Campbell: These will be marked as 202 and 202A in evidence, is that correct, your Honor?

Mr. Campbell: Reading plaintiff's Exhibit 202, telegram on the blank of the Western Union, addressed to

'Leland H. Bidleman
'Route 2,
'Little Falls, New York.

'Finishing my work November 1st. The recent offer [518] securities First Security Deposit Corporation still obtainable if accepted by above date, otherwise withdrawn. Draw draft as outlined in letter. Prompt reply will be appreciated.

'C. L. CRONK.' "

(Testimony of Leland H. Bidleman.)

The witness further testified: That subsequent to the receipt of the telegram, I accepted the offer and that I received for my securities \$11,887.85. I received plaintiff's Exhibit 203 for identification, a letter on the letterhead of the Investment Finance Company dated December 5, 1936, through the mail. I received plaintiff's Exhibits 204 and 205 respectively, dated March 30, 1937 and March 28, 1938, for identification through the mail. (Said letters were received in evidence and respectively marked plaintiff's Exhibits 203, 204 and 205.)

The witness further testified: That he received plaintiff's Exhibit 167 for identification, a letter on the letterhead of the Investment Finance Company dated June 30, 1938 in the envelope attached, through the mail. (Said letter was received in evidence and marked plaintiff's Exhibit 167.) [519]

"Mr. Campbell: Plaintiff's Exhibit 203:

'Investment Finance Company
415 South La Brea Avenue
Los Angeles, California

December 5, 1936.

Leland H. Bidleman or
Grace Bidleman
Route No. 2
Little Falls, N. Y.

Dear Sir and Madam:

What is the present market value of my First Security Deposit Corporation bonds? Is it possible now for me to realize

(Testimony of Leland H. Bidleman.)

immediate cash and suffer no unfair loss? These and other questions, naturally arise in the minds of investors whose securities have been adversely affected by conditions through which we have been passing for the past few years. We want to assist you on the basis of the actual operating experience of the First Security Deposit Corporation. At this time we can offer to all bondholders in the First Security Deposit Corporation a cash market for their bonds, and would welcome an opportunity to talk this matter over with you.

'Should you feel that you can make better use of money at this time, either in the making of other investments or in the meeting of current needs, rather than waiting and endeavoring to anticipate what economic events or happenings will occur between now and the time these bonds mature, we will pay you a fair price for your bonds. This is a matter strictly for your own judgment.

'It undoubtedly will become necessary for the First Security Deposit Corporation to revamp the present operating set-up in order to cope with rapidly changing conditions, the fall in interest rates, and increased taxes. These are conditions over which neither you nor the First Security

(Testimony of Leland H. Bidleman.)

Deposit Corporation have any control.

[520]

'Our sole aim is to make what we consider a fair offer in order that those who hold bonds and desire, or need, money at this time may have an opportunity to procure it. This offer remains open until January 15th, 1937.

'If you should desire further information regarding the First Security Deposit Corporation, either that company or this company as its affiliate, will gladly assist you in any way possible.

Yours very truly,
INVESTMENT
FINANCE COMPANY
By C. W. TWOMBLY'.

Plaintiff's Exhibit 204, on the letterhead of Investment Finance Company:

'Investment Finance Company
415 South La Brea Avenue
Los Angeles, California

March 30, 1937.

Grace Bidleman or
Leland H. Bidleman
323 W. 4th St.
Long Beach, California.

Dear Sir and Madam:

'The inquiries of First Security Deposit Corporation bondholders to our letter of

(Testimony of Leland H. Bidleman.)

December 5, 1936, were greater than we had anticipated.

'We now have available funds with which to purchase First Security Deposit Corporation bonds, and for a limited period will pay the best cash market price available to any who desire or need money at this time for current needs or other investments.

'Changing market conditions may affect a quotation on your First Security Deposit Corporation bonds. However, we will again attempt to satisfy any interested [521] bondholders.

'This offer will remain open only for such time as we are able to meet the demands under current conditions.

Yours very truly,

INVESTMENT

FINANCE COMPANY

By C. W. TWOMBLY'.

Plaintiff's Exhibit 205, on the letterhead of Investment Finance Company.

'Mr. Leland H. Bidleman
324 West Fourth Street
Long Beach, California

Dear Mr. Bidleman:

'You hold securities of the First Security Deposit Corporation, Bond No. A-1043 in the amount of \$5,700.00, A-1044

(Testimony of Leland H. Bidleman.)

amount \$3,000.00, A-501, amount \$4,100.00, A-5011, amount \$1,600.00, A-6850, amount \$264.82, and certificates A-48 for fifty-five shares Preferred, A-677 for three shares Preferred, and A-49 for twenty shares Preferred, and we are able at this time to obtain for you \$9,532.12 on same.

'Please present these securities for payment, or if you prefer, take them to your bank, endorse by yourself and Grace Bidleman before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America, Los Angeles.

'This, however, is subject to your immediate acceptance.

Yours very truly,
INVESTMENT
FINANCE COMPANY
By C. L. CRONK.

P.S. I live in Long Beach and my 'Phone number is 869-95. Will be glad to call for interview any time at your convenience.' [522]

(Testimony of Leland H. Bidleman.)

Plaintiff's Exhibit 167, upon the letterhead
of the Investment Finance Company:

'Mr. Leland H. Bidleman
324 West Fourth Street
Long Beach, California

Dear Mr. Bidleman:

'At the suggestion of Mr. C. M. Hicks, I am writing regarding arrangements made with him for liquidation of bonds of the First Security Deposit Corporation. You hold bond No. A-1043 for \$5,700.00; A-1044 for \$3,000.00, A-5010 for \$4,100.00, A-5011 for \$1,600.00 and A-6850 for \$264.82, and Certificate A-48 for fifty-five shares Preferred, A-677 for three shares Preferred, A-49 for twenty shares Preferred.

'As you know the First Security Deposit Corporation is the liquidation corporation for the old Railway Mutual Building and Loan Association. We have arranged and can obtain for you at this time a total of \$11,877.85 for these securities. Please endorse in blank by yourself and Grace Bidleman and draw draft on us for a like amount through your bank, attaching said securities. Please instruct your bank to send them through the Duns-muir and Wilshire Branch of the Bank of America, Los Angeles, or if you prefer, you may send the securities, properly en-

(Testimony of Leland H. Bidleman.)

dorsed, to Mr. Hicks and I will take them up through him.

'I think Mr. Hicks has written to you explaining these arrangements. This offer is for your immediate acceptance only.

Yours very truly,

INVESTMENT FINANCE
COMPANY

By C. L. CRONK.' " [523]

Cross Examination

By Mr. Irwin:

The witness further testified: I have a written record with me of the maturity dates of those bonds; those bonds were due in 1942. At the time these transactions were initiated I spent two or three months at Long Beach. The Mr. Hicks referred to in one of the letters is a friend of mine who lives in Long Beach.

Cross Examination

By Mr. Lawson:

The witness further testified: I did not write any letters to the First Security Deposit Corporation or the Investment Finance Company.

"Mr. Lawson: Do you have any letters, Mr. Campbell, in your possession?

The Witness: The only one I wrote is I wrote one thing, I was looking into the matter and to see whether I could afford to lose that amount of money.

(Testimony of Leland H. Bidleman.)

By Mr. Lawson:

Q. I submit to you a letter.

A. In 1933.

Q. Did you write that letter?

A. (Examining document). I did."

"Mr. Lawson: There is a detached note form on one of the letters. Perhaps Mr. Campbell can explain that.

Mr. Campbell: Yes, the first one I handed to you.

Mr. Lawson: That would be the letter of May 1933. So it ought to be attached to that exhibit that is already in.

The Court: It may be attached and made a part of the exhibit."

(Said letter dated May 15, 1933 from 323 West 4th Street, Long Beach, California, addressed to the First Security Deposit Corporation, was received in evidence and marked defendant's Exhibit N.) [524]

The witness further testified: I kept in close touch with my investment with the company to see how matters were progressing in connection with the company. I kept in touch with the checks of the First Security Deposit Corporation. I talked over the affairs of the Investment Finance Company with my friend Mr. Hicks after this Cronk had been with him. We had taken Cronk into consideration. I wasn't taking Mr. Hicks in, I was taking this man, Cronk. I did not discuss this with anybody else besides Mr. Hicks, only with the banks. I took it up with the bank in Little Falls. I took

(Testimony of Leland H. Bidleman.)

it up with the bank somewhere along in November and December of 1938; that is when the deal was on.

“Q. Had you referred it to any other bank before that time?

A. No. I referred it to the banks. I showed the letters to the bank.

Q. Did the bank make an investigation?

A. They made an investigation.

Mr. Campbell: That is objected to as improper cross examination.

* * * * *

The Court: The objection will be sustained on the ground that it is not proper cross examination.”

The witness further testified: ‘That he wrote the letter dated July 26, 1938 and sent it to the Investment Finance Company; that his letter is in reply to the Investment Finance Company letter of July 17, 1938. (Said letter was offered and received in evidence as defendant’s Exhibit P).

“Mr. Lawson: I wish to read this letter (Exhibit P) at this time.

‘Little Falls, New York

‘July 26, 1938

‘Investment Finance Company [525]

‘415 South LaBrea Avenue

‘Los Angeles, California.

‘Dear Sir:

‘Considering offer of July 17, 1938, we are checking up on our financial affairs to

(Testimony of Leland H. Bidleman.)

see if we can afford to lose so large an amount on First Security Deposit Corporation shares and bonds.

'Thanking you, I will keep in touch with you.

Yours very truly,

LELAND H. BIDLEMAN,
GRACE BIDLEMAN,'"

The witness further testified: That he signed his own name and that of Grace Bidleman to the letter. (Defendant's Exhibit P). I sold the securities after I wrote that letter; that is, after I had considered about two or three months. I took it under consideration for two or three months. As stated in my letter, I was checking up. I made a check-up in this way; I figured their statements kept showing a deficiency all the whole and bye and bye they would go broke and I couldn't get nothing. Asked if he got his interest on the securities from the First Security Company, the witness answered: "I got them regularly in an irregular way".

The witness further testified: That he talked with Mr. Cronk down at Long Beach when he first came around. I told Mr. Cronk I wasn't doing business that way. When I did business I did it through the banks. I talked to Mr. Cronk once or twice. Besides myself when I talked with Mr. Cronk, Mrs. Bidleman was present. I couldn't tell you when that was that I talked with him; the first maybe was February or January in 1938. I told Mr. Cronk that I did business with the banks.

(Testimony of Leland H. Bidleman.)

“Cross Examination
(Continued)

By Mr. Butler:

Q. Mr. Bidleman, do you recognize anybody in the [526] court room that you talked with in regard to your securities?

A. I don't know whether Mr. Cronk is present or not.

The Court: Can you see well enough to know people?

Will you come up here please, so he can see you?

(The defendant indicated came forward.)

The Court: Did you ever talk with this man, so far as you know?

The Witness: What is that?

The Court: Did you ever talk with this man? I am going to bring up several of them. Did you ever talk with that man?

The Witness: I couldn't say. He has changed some if I have. I think that man was a fleshy fellow.

The Court: Will you come forward, please?

(The defendant indicated came forward.)

The Court: Have you ever talked with this man?

The Witness: No.

The Court: Will you come up here?

(The defendant indicated came forward.)

The Witness: Go back. I never talked with him, no. Sit down.

(Testimony of Leland H. Bidleman.)

The Court: Did you ever talk with him?

The Witness: No.

The Court: Will you come up here?

(The defendant indicated came forward.)

The Court: No, sit down.

Will you come up?

The Witness: No, not that one." [527]

CLARENCE M. HICKS

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

"Mr. Irwin: Same objections as has gone to the other witnesses will go to this witness.

The Court: Same objection, same ruling.

Mr. Irwin: And exception."

The witness testified: I live at 323 West 4th Street, Long Beach. During the year 1932 and prior thereto, my wife and I were owners of securities or depositors with the Railway Mutual Building and Loan Association. During the course of 1932 I exchange the securities I had in that building and loan association for securities of the First Security Deposit Corporation. Since I exchanged my securities I have received correspondence from the First Security Deposit Corporation. I have also received correspondence from the Investment Finance Company. I did not retain any of that correspondence. I received the original of plaintiff's Exhibit 206 for identification, a form letter

(Testimony of Clarence M. Hicks.)

dated November 15, 1932, addressed to me and bearing the typewritten signature "C. E. Perkins." The securities referred to in the carbon copy were enclosed in the original letter which I received. The blue card referred to in the letter was enclosed with the original letter. (The letter was received in evidence and marked plaintiff's Exhibit 206. Said letter is separately certified pursuant to stipulation and order of Court).

The witness further testified: That the card headed "First Security Deposit Corporation," dated December 6, 1932, signed "C. M. Hicks and Cornetta Hicks" is the card I received with the original of plaintiff's Exhibit 206; that it bears his signature and his wife's signature; That after signing the card, it was return to the company. (Said card was withdrawn from plaintiff's Exhibit 34 and was received in evidence and marked plaintiff's [528] Exhibit 207, which said exhibit is separately certified pursuant to stipulation and order of Court).

The witness further testified: I received each of the securities mentioned in plaintiff's Exhibit 206; They were:

"A-781, 57 shares Preferred stock A, \$1,140; A-6952, accumulative bonds, \$3,061.39; A-5169, full paid bond, \$1,500; A-1183, full paid bond, \$1,000."

Subsequent to the receipt of those securities I sold them in May, 1938, to Mr. Cronk. Plaintiff's Exhibit 208 for identification was the check I re-

(Testimony of Clarence M. Hicks.)

ceived from the sale of my securities. That is the full amount received by me for such sale. The check was delivered to me at my home by Mr. Cronk. (Said check was received in evidence and marked Exhibit 208 which said check is separately certified pursuant to stipulation and order of Court).

The witness further testified: That he met Mr. Cronk possibly six weeks or two months prior to May 28, 1938; I met him at my home. I had a conversation with Mr. Cronk at the time relative to the sale of my securities. He talked to me about buying them. He said he could give me 70 and two. 70 on the bonds and \$2.00 on each share of stock; He said that he was afraid that the Commissioner would take it over or go into bankruptcy and that they were making no money. When he referred to the Commissioner, I said the Building and Loan Commissioner. I told him I hoped they would and he said "No, you don't, because they have come in and taken the best of the stock out; there is nothing but junk left." He said that the company they organized as a subsidiary of the First Security had taken it out. I do not recall the name of the subsidiary. I told him I would let him know. It ran along for probably a month before he came back and then he offered me 80. He offered me 80 a few days before I sold them. He possibly talked to me over the phone at that time. I don't think he came to my house any more. He said he had a chance to give me \$10.00 more or \$80.00 for the [529] other and \$2.00 on the shares and I said I would talk it

(Testimony of Clarence M. Hicks.)

over with my wife and let him know. I have told you all that I recall Mr. Cronk said during the course of those conversations. Asked what else he recalled Mr. Cronk said, the witness answered:

"Well, any more than he said that they were not making any money, the First Securities, and that he thought it was a good thing for me to get out of it. At the time of the conversation when he told me he could pay \$80.00 or 80%, he said he could pay me more than he had some others—that he had authority to pay more than others. He didn't tell me why."

Asked if Mr. Cronk had said anything with reference to the Investment Finance Company, the witness answered:

"He said they had got in and got the best of the stock, the best of the profit. It was after these conversations that I accepted the \$80.00 or the 80% offer. The amount I received, \$4,563.00 was for both the bonds and the stock which I had in that corporation."

Cross Examination

By Mr. Irwin:

I think I received my interest on the bonds up to the time I sold them. I received interest from time to time. They were always three months behind in the interest. I should have the interest for May, 1938 that I didn't get when I sold, I guess.

(Testimony of Clarence M. Hicks.)

Cross Examination

By Mr. Butler:

Asked if anyone besides Mr. Cronk ever contacted him with regard to the sale of securities in the First Security, the witness answered: "I don't think so. I got some cards from some Mr. Jeffers in Long Beach down there." Asked if he had any conversation with Mr. Jeffers, the witness answered: "I used to go down and talk with him once in a while. I had a conversation with Mr. Jeffers about the First Security Deposit Corporation in February of 1938; that was before I talked with Mr. Cronk. Mr. Cronk told me the first time he came to see me that he was representing the [530] *the* company and was around buying up the stock; that he thought it was a good plan for us to get out. He said he was representing the First Security. I don't remember much about the conversation. Mr. Crank gave me his individual check. I did not believe I was selling it to him personally. I knew I was selling it to the other company—some finance company. I knew at the time I sold my bonds that they would be due until after 1942." Asked if he had a discussion with Mr. Cronk regarding the fact that his bonds would not be due until after 1942, the witness answered: "I don't think we had much of a conversation."

Redirect Examination

Mr. Jeffers is a man who was in the commission business in Long Beach, and I used to get some cards from him.

ALICE GEDDES

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am the daughter of Hattie R. Geddes. My mother and I were security holders in the Railway Mutual Building and Loan Association. I believe we caused our securities in the building and loan association to be transferred or exchanged into securities of the First Security Deposit Corporation.

"Mr. Butler: At this time I object to the testimony of this witness on the ground that it is immaterial and hearsay.

The Court: The same objections that have been made to each of the investors may be deemed to be made as to all defendants; the same ruling.

The witness further testified: The amount of my investment which was exchanged into the First Security Deposit Corporation was \$303.00. I do not recall what securities were issued to me in exchange for those in the Railway Mutual. During the period of time [531] that I and my mother were owners of these securities I did not always examine the correspondence which came in reference to them. We discussed it. The letter, plaintiff's Exhibit 209 for identification, dated December 5, 1936, I recall; I recall whether or not such letter was contained in an envelope which is attached; it was received through the mail. (Plaintiff's Exhibit 209 for identification was offered and received in evidence and marked plaintiff's Exhibit 209. Said

(Testimony of Alice Geddes.)

exhibit is separately certified pursuant to stipulation and order of Court).

The witness further testified: My mother and I had occasion to go to the office of the First Security Deposit Corporation; so far as I remember it could have been in November of 1937. The signature appearing on the reverse side of the check, plaintiff's Exhibit 210 for identification, is my mother's signature; the date of it is November 4, 1937; it is the check received in the sale of our securities; it was received on the day we went into the office of the company; that was the date we called at the offices of the company. (Said check was received in evidence and marked plaintiff's Exhibit 210. Said check is separately certified pursuant to stipulation and order of Court).

The witness further testified: We went to the office in response to a number of letters that we had received.

The witness was shown a letter dated July 17, 1937 addressed to "Our Bondholders" signed "First Security Deposit Corporation by C. L. Cronk" to which was attached an envelope addressed to Hattie R. Geddes and bearing cancellation date of July 20, 1937 and testified that that was one of the letters received. (It was stipulated that the letter was in identical form and text as plaintiff's Exhibit 184).

"Mr. Campbell: I will read it only in part:

'For these reasons I have been employed to conduct a survey of the bondholders of the

(Testimony of Alice Geddes.)

First Security [532] Deposit Corporation and I will very much appreciate the courtesy of an interview with you in the near future. I will call upon you or if you prefer, I will see you at this office.' "

The witness further testified: On the occasion we went to the offices of the company on November 4, 1937, we had a conversation with Mr. Twombly. Mr. Twombly stated that his best offer on our holdings would be 70 cents on the dollar. My mother asked him if that was his very best offer and he said it was; that he felt in the future it wouldn't be as good, if they could offer us anything at all; that he felt that conditions, business condition in general, were very bad and in view of that fact he himself wanted to withdraw from the company as soon as possible, as soon as he could settle his own business affair with the company. My impression was that he was very sincere in advising us to sell at that time. He said he was awaiting word from some commissioner who was going to get him a report on conditions; he said the Building and Loan Commissioner. It was on the occasion of that conversation that we sold our securities and received the check which I have identified; that check was the full amount received for all of our securities.

"Mr. Campbell: At this time I will read from plaintiff's Exhibit 45, purchase order of the Investment Finance Company No. 875, dated November 4, 1937.

(Testimony of Alice Geddes.)

'To Hattie R. Geddes:

'No. A-6256; Quantity—80.13; Cumulative—non-prior; Price—\$56.07; Unit 70;

No. A-6255; Quantity—\$133.18—'

Mr. Irwin: Could I ask counsel for the last figure?

Mr. Campbell: The second item is:
'A-6255; Quantity—\$133.18; Cumulative—
non-prior Price—\$93.20;

'No. A-2159; Quantity—\$30.39; Cumulative—
prior \$21.27; [533]

'Total quantity, \$243.70; Price \$170.54.'

Dated 11-4-37, Check No. 1395, with the
initials of 'C. W. T., R. W. S., E. C. T.' "

At the time we turned in the bonds referred to, we also turned in shares of stock in the First Security for which we received \$2.00 per share. The check we received must have been in payment of both our bonds and stock.

Cross Examination

By Mr. Adams:

The witness was asked if Mr. Twombly didn't tell them that they were awaiting a report from the Bureau of Internal Revenue with reference to taxation rather than the Building and Loan Commissioner, and answered: "My impression is that it was the Building and Loan Commissioner"; that she did not remember that Mr. Twombly said they were waiting for a tax report from the Bureau of Internal Revenue.

"Mr. Campbell: Now I have a certain matter that I wish to read, if I may take the witness stand for that purpose.

First, I will read from plaintiff's Exhibit 23, the journal of the First Security Deposit Corporation, entries appearing on page 110 of the record of journal entries, month of April, 1934, which entries purport to show the issuance of various types of bonds of the corporation.

'4 per cent short term prior, maturity date February 1, 1933; net original issue, \$4,438.'

If I may, I will read the maturity dates to be followed by the amount issued.

The Court: Yes.

Mr. Campbell: 'May 1, 1933, \$7,078.66; August 1, 1933, \$6,235.49; November 1, 1933, \$14,067.62; February 1, 1934, \$4,592.34; May 1, 1934, \$6,283.93; August 1, 1934, \$4,520.89; November 1, 1934, \$9,492.85' [534]

The dates, as given, are all maturity dates.

4 per cent short term non-prior—I will read the maturity dates followed by the net issue.

'Maturity date February 1, 1933, \$3,351.40; April 1, 1933, \$340.69; May 1, 1933, \$4,573.31; August 1, 1933, \$3,789.30; November 1, 1933, \$4,960.69; February 1, 1934, \$1,664.67; May 1, 1934, \$2,435.00; August 1, 1934, \$735; November 1, 1934, \$6,945.04.

5 per cent cumulative prior: 'Maturity date, November 1, 1935, \$1,277.92; November 1, 1937, \$3,562.46; November 1, 1938, \$4,242.00; November 1, 1942, \$113,681.80.'

5 per cent cumulative non-prior: 'November 1, 1937, \$12,523.96; November 1, 1938, \$1,005.49; November 1, 1942, \$31,098.78.'

6 per cent full paid prior: 'November 1, 1935, \$10,400.

'November 1, 1937, \$53,700.

'November 1, 1942, \$358,200.

5 per cent full paid prior: 'Maturity date, November 1, 1942, \$3,000.

6 per cent full paid non-prior: 'November 1, 1937, \$28,100.

'November 1, 1942, \$211.700.

5 per cent full paid non-prior: 'November 1, 1937, \$4,200.

'November 1, 1938, \$300.

'November 1, 1942, \$24,300.'

This is a grand total of all that I have so far given. \$1,295,694.90."

Mr. Adams: I take it, your Honor, too, that all of this [535] testimony, that the objections that went to the book in its original offer and the entries are, of course, also made to the reading without repeating them?

The Court: Same objection made to the original book and entries contained will hold as to

these and need not be repeated, as to all defendants."

Mr. Campbell: Reading from plaintiff's Exhibit 26:

'Bond A-6048; issued to Grace Benn; face amount \$221.66; type Accumulative Non Prior; Maturity date, November 1, 1942.

'Bond A-1044; issued to L. H. Bidleman; face amount, \$3,000; type full paid prior; maturity date, November 1, 1942.

'Bond A-1043; issued to L. H. Bidleman; face amount \$5,700; type full paid prior; maturity date, November 1, 1942.

'Bond A-5010; issued to L. H. Bidleman; face amount \$4,100; type full paid non-prior; maturity date, November 1, 1942.

'Bond A-5011; issued to L. H. Bidleman; face amount \$1,600; type full paid-non-prior; maturity date, November 1, 1942.

'Bond A-6850; issued to L. H. Bidleman; amount \$264.82; type cumulative non-prior; maturity date November 1, 1942.

'Bond A-7195; issued to Paul Burkholder; amount \$391.22; type accumulative non-prior; maturity date November 1, 1942.

'Bond A-2573; issued to Paul Burkholder; amount \$17.06; type accumulative prior; maturity date November 1, 1942.

'Bond A-1493; amount, \$1,400; type full paid [536] prior; maturity date November 1, 1942.

'Bond A-6740; issued to D. L. Carstensen; amount \$281.89; type accumulative non-prior; maturity date November 1, 1942.

'Bond A-8049; issued to D. L. Carstensen; amount \$50.00; type—short term—non-prior; maturity date November 1, 1933.

'Bond A-8050; issued to D. L. Carstensen; amount \$50.00; type, short term non-prior; maturity date May 1, 1934.

'Bond A-8051; issued to D. L. Carstensen; face amount \$50.00; type, short term non-prior; maturity date November 1, 1934.

'Bond A-2159; issued to Hattie Geddes; face amount \$30.39; type accumulative prior; maturity date November 1, 1942.

'Bond A-6255; issued to Hattie Geddes; face amount \$133.18; type, accumulative—non-prior; maturity date November 1, 1942.

'Bond A-6256; face amount \$80.13; issued to Hattie Geddes; type accumulative non-prior; maturity date November 1, 1942.

'Bond A-1183; issued to C. M. Hicks; face amount \$1,000; type, full paid prior; maturity date November 1, 1942.

Bond A-5169; issued to C. M. Hicks; face amount \$1,500; type full paid non-prior; maturity date November 1, 1942.

'Bond A-7159; issued to C. M. Hicks; face amount \$3,061.39; type accumulative non-prior; maturity date, November 1, 1937.

'Bond A-6333; issued to S. H. Jacobson; face [537] amount \$1,093.60; type accumulative non-prior; maturity date November 1, 1942.

'Bond A-6963; issued to Florence Johnson, face amount \$736.04; type accumulative non-prior; maturity date November 1, 1937.

'Bond A-2339; issued to Audra Jones, face amount \$4,242; type accumulative prior; maturity date November 1, 1938.

Bond A-6967; issued to Audra Jones; face amount \$1,005.49; type accumulative non-prior; maturity date November 1, 1938.

'Bond A-1215; issued to F. W. Kidder; face amount \$700; type full paid prior; maturity date November 1, 1942.

'Bond A-2057; issued to Bessie Chobotsky; face amount, \$215.87; type accumulative prior; maturity date November 1, 1942.

'Bond A-2247; issued to F. W. Kidder; face amount \$26.63; type accumulative prior; maturity date November 1, 1942.

'Bond A-5175; issued to F. W. Kidder; face amount \$100.00; type full paid non-prior; maturity date November 1, 1942.

'Bond A-6971; issued to F. W. Kidder; face amount \$60.00; type accumulative non-prior; maturity date November 1, 1942.

'Bond A-1254; issued to Bessie Matte-

son; face amount, \$1,000; type full paid prior; maturity date November 1, 1942.

‘Bond A-5187; issued to C. D. Matteson; face amount \$2,400; type full paid non-prior; maturity date November 1, 1942.

‘Bond A-6466; issued to S. H. Mitchell; face amount \$440.37; type accumulative non-prior; maturity date November 1, 1942.

[538]

‘Bond A-1260; issued to Fred Morse; face amount \$1,000; type full paid prior; maturity date November 1, 1942.

‘Bond A-2309; issued to Fred Morse; face amount \$100; type accumulative prior; maturity date November 1, 1942.

‘Bond A-8250; issued to Fred Morse; face amount \$7.30; type short term non-prior; maturity date May 1, 1933.

‘Bond A-1246; issued to A. H. McConnell; face amount \$2,000; type full paid prior; maturity date November 1, 1942.

‘Bond A-6988; issued to A. H. McConnell, face amount \$468.41; type accumulative non-prior; maturity date November 1, 1942.

‘Bond A-5213; issued to W. H. Robinson; face amount \$2,400; type full paid non-prior maturity date November 1, 1942.

‘Bond A-1495; issued to Elsie Smith, by Hattie Geddes; face amount \$3,900; type

full paid prior; maturity date November 1, 1942.

‘Bond A-2575; issued to Elsie Smith, by Hattie Geddes; face amount \$33.19; type accumulative prior; maturity date November 1, 1942.

‘Bond A-2576; issued to Elsie Smith, by Hattie Geddes; face amount \$987.70; type accumulative prior; maturity date November 1, 1942.

‘Bond A-1350; issued to D. S. Taylor; face amount \$1,100; type full paid prior; maturity November 1, 1942.

‘Bond A-2423; issued to D. S. Taylor; face amount \$86.08; type accumulative prior; maturity date November 1, 1942.

[539]

‘Bond A-1369; issued to J. S. Walker; face amount \$700; type full paid prior; maturity date November 1, 1942.

‘Bond A-6695; issued to L. A. Walker; face amount \$113.21; type accumulative non-prior; maturity date November 1, 1942.

‘Bond A-2463; issued to Jack Winston; face amount \$387.23; type accumulative prior; maturity date November 1, 1937.

‘Bond A-1499; issued to Mary Wisely; face amount \$2,500; type full paid prior; maturity date November 1, 1942.

Bond A-2721; issued to Kate Wright; face amount \$854.20; type accumulative

non-prior; maturity date November 1, 1942.'

WADE H. ROBINSON

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am in the insurance business and prior to the year 1932 I was an investor in the Railway Mutual Building and Loan Association and subsequently I exchanged or transferred my securities to the First Security Deposit Corporation.

"The Court: This is one of the investors?

Mr. Crawford: Yes.

The Court: The same objections may be deemed to be made there, the same running objections, by all defendants, and the same ruling."

The witness further testified: The total amount of my investment was \$3,000.00. I received the letter on the letterhead of the Investment Finance Company dated March 30, 1937, by mail. (It was stipulated that the letter identified by the witness was [540] identical with the letter, plaintiff's Exhibit 145.)

The Witness further testified: I received the letter on the letterhead of the First Security Deposit Corporation dated July 17, 1937, addressed to "Our Bondholders" through the mail. (It was stipulated that the letter identified by the witness was an identical copy of plaintiff's Exhibit 193).

(Testimony of Wade H. Robinson.)

The witness further testified: I received the original of plaintiff's Exhibit 211 for identification. I did not retain the original. (Said carbon copy of the letter was received in evidence and marked plaintiff's Exhibit 211).

"Mr. Crawford: I will now read Plaintiff's Exhibit 211 to the jury.

'November 3, 1937.

Mr. Wade H. Robinson
3707 E. 5th Street
Long Beach, California

Dear Sir:

'You hold securities of the First Security Deposit Corporation, Bond No. A-5213 in the amount of \$2400.00 and Certificate A-906 for thirty shares Preferred, and we are able at this time to obtain for you \$1740.00 on same.

Please present these for payment, or if you prefer, take them to your bank, endorse by yourself and Jane S. before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America, Los Angeles.

This however, is subject to your acceptance within ten days.

Yours very truly,

INVESTMENT FINANCE
COMPANY,
By C. L. CRONK'" [541]

(Testimony of Wade H. Robinson.)

The witness further testified: I had several visits with Mr. C. L. Cronk, but I don't know whether the first one was before the receipt of plaintiff's Exhibit 211 or after; I don't remember whether the first conversation was before or after. The first time I met Mr. Cronk was at his home in Long Beach. Mr. Cronk told me he was in a position to offer me a certain amount for that stock—he stated the amount but I don't remember whether that was the first offer he made me or not, and I don't remember the amount that he stated at that time. I remember that whatever the figure was I told him I didn't believe I cared to sell it at that time for that amount. He stated that that amount was an amount above the offer that had been made before; that it was somewhat better than the stock had been listed, and that it looked like it would be probably as good as I would be able to get for it. He showed me a list of names of persons who had accepted the offer. I think Mr. Cronk told me that the affairs were going through a procedure of receivership; and the affairs usually operated at a loss to the stockholders; the funds usually were used up by the expenses of the receivership or something to that effect. I did not sell my securities at that particular conversation. I don't recall any conversations after that until the time I sold my stock; I believe it was in the Fall of 1938. That conversation took place in my home. Besides Mr. Cronk and myself my wife was present for part of the conversation. At that time Mr. Cronk told me

(Testimony of Wade H. Robinson.)

they had been able to dispose of the stocks at a better figure than they had anticipated and offered me an amount above his previous offer and said: "You understand that the company has disposed of its choicest properties and I think this is as much as you will probably be able to get for that stock. And it is getting expensive now—most of them have sold, and the ones who are left are widely separated and it is expensive to contact all of them. So I think it would be advisable for you to take advantage of the offer". [542]

The witness further testified: I didn't accept that offer. I told him that there would be an interest payment due; that I would hang on to it at least until after that payment was made and he said: "If I could get that payment above this offer paid to you now, would you consider this", and I said I thought I would. He then made a telephone call from my house. I didn't pay any attention to the telephone conversation; I just heard him state the fact that we had talked and he said: "All right you have the stock here. I will give you a check for it now." At the time he put in a telephone call he stated he would telephone his company. He stated the company but I don't remember which one he mentioned. After the telephone conversation, he purchased my securities at the price he suggested to me, including interest. Plaintiff's Exhibit 212 for identification, a check dated August 2, 1938, payable to me in the sum of \$2,072.00 and signed, "C. L. Cronk" bears on the reverse side my signature and

(Testimony of Wade H. Robinson.)

the signature of my wife. This is the check I received in payment for my stock. (Said check was received in evidence and marked plaintiff's Exhibit 212. Said exhibit is separately certified pursuant to stipulation and order of Court).

"Mr. Crawford: Reading from Government's Exhibit 45:

'Order No. 1030
Purchase Order
Investment Finance Company
415 South LaBrea Avenue
Los Angeles, California

August 22, 1938

To Wade H. and Jane J. Robinson

A-5213, quantity wanted, \$2400, full paid non-prior, price: \$2,070; unit 86 1/3. Interest allowed \$72.00; Cronk Check No. 241; R. W. S.; J. H. E.; E. C. T.; price approved, Board of Directors' meeting September 29, 1938'" [543]

Cross Examination

By Mr. Lawson:

I think my bonds matured November 1, 1942. I knew that at the time I sold the bonds. The original securities I had in the Railway Mutual that I exchanged for stock was one \$2,000 piece and a \$1000. one. I don't recall the type of securities I had in the old Railway Mutual. I do not recall that the securities that I had in the old Railway

(Testimony of Wade H. Robinson.)

Mutual were subordinate to an issue ahead of my securities; I guess it was in the form of an investment certificate. I presume it is correct that there was an issue of investment certificates ahead of mine.

“By Mr. Lawson:

Q. Do you recall, Mr. Robinson, that when you received the securities of the First Securities Deposit Company, that you received them on the basis of 80 per cent in collateral trust bonds in the First Security Company, 80 per cent of the face value of the securities that you had in the Railway Mutual Company, and 20 per cent of that face value in preferred stock of the First Security?

A. Yes, I think that is correct.”

(It was stipulated that all bonds of the First Security were issued November 1, 1932).

The witness further testified: That he received interest on his collateral trust bonds from the time that they were acquired and up to the time that he sold them; that he did not recall the rate of interest but the amount was \$72.00 every six months; that he received those payments in each year up to the date he sold his securities.

The witness further testified: Mr. Cronk didn't say it was above the listed price at that time, but it was above the price that it had been listed prior to that time; He claimed this figure was better than —there had been an improvement in the price of the

(Testimony of Wade H. Robinson.)

stock over the time prior to that; he stated that he thought it [544] would be a good time to dispose of it because of the expense of sending someone around to contact these people and the expense of the receivership. He told me that that price which he offered was as good a price as he could get from my securities from any other source; I think that that was the price that was listed. I don't remember that he said it was a better price than I could get from any other source. I didn't make any inquiry to find out whether his statements were correct because I didn't consider selling it at that price at that time. However, different brokers would send me a card sometime listing what the price of it was. The price he offered me was just about the same as these brokers. I wouldn't be able to say whether the price he offered was a little bit better than the price offered by the brokers.

The witness was asked to tell everything that Mr. Cronk told him about receivership and answered: I don't know that I can tell you everything he said, but I remember he said 'You probably are familiar with receiverships, and if you are, you know something of how the funds go, that the expense of the receivership generally takes a big share of the funds.' I had had some experience; that part of Cronk's statement regarding receiverships was a correct statement. I don't remember that Cronk made the statement that if the old Railway Mutual had gone into receivership that I wouldn't have received anything like the offer he made to me.

(Testimony of Wade H. Robinson.)

Asked if Cronk made any statement regarding the difficulties that the First Security had in making expenses and paying the interest charges and trust charges, the witness answered: He told me that it was very expensive to contact all the stockholders and try to deal with them and get the affairs settled and the expense of the whole thing was heavy. He didn't tell me that they had difficulty in collecting their rents and their interest and the income to which the company was entitled. It was approximately a year between the first and second conversation that I had with Mr. Cronk. When I had [545] the second conversation with Mr. Cronk in August, 1938, I knew there had been an improvement in conditions, economically, and business was better. The highest offer that Mr. Cronk made was in August, 1938. In the second conversation Mr. Cronk in substance stated that the choicest of the properties of the company had been disposed of. I did not make any investigation or check to determine whether that was correct or not. I still have my 30 shares of preferred stock in the First Security Company.

LYMAN S. WALKER

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

I am a railroad switchman. Prior to the year 1932, I was an investor in the Railway Mutual Building and Loan Association.

(Testimony of Lyman S. Walker.)

"Mr. Butler: At this time I object to the testimony of this witness * * * on the ground that it is hearsay and immaterial.

The Court: Same objections as to each defendant may be deemed to be made, and the same ruling."

The witness further testified: That thereafter he exchanged or transferred his Railway Mutual securities into the securities of the First Security Deposit Corporation. That his total investments consist of a full paid up \$700 bond and an accumulative bond of \$113.21; also nine shares of stock, two shares of stock for my boy, which my daughter Lois Maxine Walker has now. The full paid up bond is A-1369 and the accumulative bond is A-6695. I had occasion to call at the offices of the First Security Deposit Corporation in the month of May or June of 1937; my wife accompanied me. At the office we were introduced to Mr. Twombly and had a conversation with him. We came in there to see if we could get our money out of our securities and he told us the financial condition that the company was in. He told us they were in a bad condition [546] and practically on the verge of bankruptcy and that the securities wasn't worth a lot of money but they could take care of them at some kind of a price for us, and he stated a price that didn't satisfy us; so we didn't sell the bonds. The price he offered us at that time was less than 80 cents on the dollar. We had another conversation with

(Testimony of Lyman S. Walker.)

Mr. Twombly the middle of 1937 at the offices of the Security First National on LaBrea Avenue; my wife was with me at that time; at that time he told us practically the same thing as in the first conversation; that things were looking bad; he told us that inasmuch as the company was right on the verge of a breakdown, or he told us that he could give us around what he offered us before, maybe a dollar or more; he says "that is about all, we can't give you any more than that". We did not accept the offer.

The witness further testified: That the original of plaintiff's Exhibit 213 for identification, a letter dated November 8, 1937, addressed to Mr. L. S. Walker, signed Investment Finance Company, C. L. Cronk, was received by him through the United States mail. That he received the original of plaintiff's Exhibit 214 for identification through the United States mail. (Thereupon plaintiff's Exhibits 213 and 214 for identification respectively were offered and received in evidence).

"Mr. Crawford: I will now read to the jury Government's Exhibit 213.

'November 8, 1937

Mr. L. S. Walker
3422 Loosemore Street
Los Angeles, California

Dear Sir:

You hold securities of the First Security Deposit Corporation, Bond No. A-1329 in the amount of \$700.00 and Certificate

(Testimony of Lyman S. Walker.)

A-873 for nine shares Preferred, and we are able to obtain at this time \$508.00 on same.

Please present these securities for payment, or if [547] you prefer, take them to your bank, endorse by yourself and Grace E. Walker before witness, and draw a draft on us for this amount through the Duns-muir and Wilshire Branch of the Bank of America.

This, however, is subject to your acceptance within ten days.

Yours very truly,

INVESTMENT FINANCE
COMPANY,

By C. L. CRONK.'

Now, reading plaintiff's Exhibit 214, a letter dated November 16, 1937, addressed to L. S. Walker, 3422 Loosemore Street, Los Angeles, California.

'Dear Sir:

You hold securities of the First Security Deposit Corporation, Bond No. A-6695 in the amount of \$113.21, and Certificate A-532 for two shares Preferred, in the name of Lois Maxine Walker, a minor, and we are able at this time to obtain for you \$83.24 on same.

Please present these securities for payment, or if you prefer, take them to your bank, endorse by yourself as guardian, to-

(Testimony of Lyman S. Walker.)

gether with the enclosed affidavit properly executed before a notary, and draw a draft on us for this amount through the Duns-muir and Wilshire Branch of the Bank of America, Los Angeles.

This, however, is subject to your acceptance within ten days.

Yours very truly,

INVESTMENT FINANCE
COMPANY,
By C. L. CRONK.'

The witness further testified: That approximately three to five months following the receipt of the letter, plaintiff's Exhibit 214 dated November 16, 1937, had a conversation with C. L. [548] Cronk; the conversation took place in my home in the presence of my wife; Mr. Cronk came and told us that he came to see what we were going to do about the disposing of our bonds and he told us *what we were going to do about the disposing of our bonds and he told us* that the company was on the verge of a collapse and he wanted to get the business straightened up for them, then he made us an offer. We did not accept the offer. It was not a very long time after when he came back and we had another conversation; the conversation was along the same line; I asked if they were any higher and he said "They are just in as bad shape, or worse". He said, "I am here to close it up", or else, "We have got to close it up. I want to get it

(Testimony of Lyman S. Walker.)

closed up for them". He made me an offer of approximately 80 cents on the dollar. I did not accept the offer but I made him a proposition and he accepted that; I told him I wouldn't sell for less than 85 cents on the dollar anyhow; that I would lose it all before I would do that. He accepted the offer and wrote me a check for it.

Plaintiff's Exhibit 215 for identification, a check dated October 19, 1938 payable to me for \$691.22, signed by C. L. Cronk, is the check that Mr. Cronk gave me at that time. It bears my signature on the reverse side. (The check was received in evidence and marked plaintiff's Exhibit 215, and is separately certified pursuant to stipulation and order of Court).

The witness further testified: This sale included only the bonds; I still have the stock.

Cross Examination

By Mr. Irwin:

The witness further testified: That in addition to the \$813.21 gross of bonds, he had some other securities which he pledged on a loan with the First Security; these securities were sold under the loan pledge and are not included in the ones I testified about. I do not recall whether I had an investment certificate in the Railway Mutual; I was not a stockholder. I did not get interest on [549] on my \$700.00 full paid up certificate from the First Security up until the time I sold it; there was times when we didn't receive any interest on it; I can't tell you

(Testimony of Lyman S. Walker.)

how many times, because after we disposed of everything, we must have destroyed everything. I think there was a couple of times that we didn't get any interest from the period we held the bonds from November 1, 1932 to October 19, 1938. I don't recall whether the interest was 5 or 6%.

The witness further testified: That he received the original of the letter, defendant's Exhibit Q for identification. He didn't recall what the face amount of the bond was that he deposited with the company as a pledge for the repayment of the money that he borrowed; they took that bond and it was supposed to have covered everything of my borrowed money. (It was stipulated that the maturity date on the bonds sold was November 1, 1942). When I went to the First Security Deposit Company's office on La Brea, I knew that the office of the Investment Finance Company was in the same suit. [550]

“Mr. Campbell: At this time, if your Honor please, I am going to renew my offer of plaintiff's Exhibit 181 as to all defendants upon the basis of the stipulation relative to the signature of J. Howard Edgerton; and I also offer the signature of the Defendant C. W. Twombly, (plaintiff's Exhibit 18) for a comparison with signatures heretofore stipulated to be his signature by counsel in this case.”

* * * * *

“Mr. Campbell: I make the same offer as to Exhibit 180 on the basis of the admitted sig-

(Testimony of Lyman S. Walker.)

nature of the defendant J. Howard Edgerton.

Mr. Irwin: May it be considered that all defendants have objected to Exhibits 180 and 181 on the grounds of hearsay and immateriality and no foundation.

The Court: Yes.

(Said offers were taken under advisement by the Court.)

Mr. Campbell: At this time I renew my offer of plaintiff's Exhibit 12 for identification, making such offer upon the basis of the admitted signature of the Defendant J. Howard Edgerton. That is an application in the matter of R.F.D. Discount Company.

Mr. Butler: On behalf of the defendant Cronk, I object on the ground that no proper foundation being laid; hearsay, and immateriality.

Mr. Lawson: Those objections run to all defendants, and not connected up, and not the proper evidence to show knowledge or intent on the part of the defendants.

Mr. Campbell: Now, I also at this time desire to renew my offer of plaintiff's Exhibit 13 for identification upon the same basis; that is to say the admitted signature of the Defendant J. Howard Edgerton. It is the matter of the R.F.D. Discount Company, a corporation, supplement to application for permit to issue stock. [551]

(Testimony of Lyman S. Walker.)

Mr. Irwin: Same objections as have been interposed as to 12.

Mr. Butler: I object on the ground of no foundation laid, hearsay and immateriality.

Mr. Lawson: Same objection.

The Court: Yes, I will take them all under advisement.

C. W. WEBSTER

My occupation is that of Post Office inspector and have been such for 38 years. It is part of my duties to investigate the alleged violations of the United States mails. I was heretofore assigned for the purpose of investigating the facts of this case in connection with my duties. I commenced my investigation in June of 1940. In the course of my investigation I called upon the defendant Edgerton for the books and records of the company. He turned them over to me.

The witness further testified: That on July 9, 1939 there came into my possession a certain statement which I received from the inspector in charge at San Francisco, California; I had a conversation with the defendant Twombly with respect to that statement in my office in this building on July 9, 1940. (Thereupon the following proceedings were had in the absence of the jury).

“Mr. Campbell: * * * * Now, this document is offered, you might say, upon two bases: First, as admission against interest on

the part of the Defendant Twombly, and, second, to show his joining that scheme, or enterprise, and as to him the existence of a scheme or enterprise."

* * * *

"The Court: Now, I think it is only fair, in order that you may present the matter intelligently to the Court, to say that it involves, for the purpose of illustration (I have gone through it very hurriedly) all of the defendants and describes at some length, six pages, single spaced, the activities of this corpor- [552] ation. So that for the purpose of argument, you may consider that all of the defendants are involved."

"The Court: It is perfectly clear that such a document as this couldn't be considered to be properly introduced in evidence as against the other defendants, having been made subsequent to the termination of any possible connection which he had with the conspiracy,

* * * *"

"* * * * it is conceded by the Government that Twombly severed his connection with both of these corporations about the 21st of December, 1938. Now, on July of 9th, 1940, a year and a half after that, he made the statement to the postal inspector as to facts."

"Mr. Campbell: * * * I am just in the process of laying my foundation. * * * *

The Court: It might be better to have that

foundation laid this afternoon, then have the matter held over until tomorrow morning.

Mr. Lawson: * * * * when I thought or heard the rumor that there might be hostile defenses. I had Mr. Adams bring Mr. Twombly to my office. * * * *

"and I canvassed this situation with him very carefully to find out—I am not saying that there are any hostile defenses—but to find out as to whether or not there were any hostile defenses.

We spent about three or three and a half hours in canvassing the case, and in all of its phases, and I was assured from the beginning until the end that no statement had ever been made by Mr. Twombly, either in the form of a written statement, or any oral statement, that he had made any damaging or incriminating statements pertinent to my client, or any of the other defendants in the case. And I want to assure your Honor that I went into that very thoroughly, and care- [553] fully.

I have no reason to believe that that statement contains anything contrary to the statements that were made to me at that time, and I can assure your Honor that up until the time that this statement was presented I have always been of that mind."

"* * * * if, assuming now that it does contain something contrary, as represented to me—it is a complete surprise. We have been

collaborating all through the defense on the assumption that no statement has been made of a damaging character to my clients.

* * * * *

Mr. Irwin: Why did we make all this inquiry at the outset?

Well, it is no secret that there was a very severe disagreement between Mr. Twombly and the others, and the break was not a pleasant one. It happened in '38, and prior to the time of this indictment they weren't even on speaking terms, so as lawyers, being advised of that, we were interested in finding out what had gone before, and that is why we started looking for those statements that might be made by a person in the heat of passion or who doesn't reason."

(Said document under discussion was then marked plaintiff's Exhibit 216 for identification).

"The Court: * * * * If they want to know what it is right now, we will have to read it out loud * * * * .

Thereupon plaintiff's Exhibit 216 for identification was read into the record, and is in words and figures following: [554]

"(In ink) Prepared by Mr. Twombly.

'The first Security Deposit corporation was organized in 1931 for the purpose of reorganizing the Railway Mutual Building and Loan Association. The latter company was rendered non-operative because of the building and loan situation existing at that time, together with

the check on operations because of the more stringent building and loan laws as compared with the regulation of general corporations.

To effect the transfer of securities and assets of the Railway Mutual Building and Loan Association it was necessary to procure the consents of its securities holders. For this purpose an extremely complicated Plan and Agreement was adopted whereby the said holders were to deposit their securities and receive in exchange therefor interim certificates. R. W. Starr, E. C. Thomas and L. S. Edwards were appointed as trustees and managers under the said plan. High pressure salesmen were then sent out to contact the securities holders for the purpose of procuring their consents to the proposed plan of reorganization. These holders were apparently promised and told anything and everything in order to obtain their consents. Those who consented easily got either what they were supposed to be entitled to in securities of the new company, or less. Those who were not so easily sold on the idea in many instances were given preferential securities. No plan of exchange of securities was consistently followed. The socalled Plan and Agreement was so long and so complicated that it was apparently understood by nobody, however, there is no doubt but that the trustees were extremely derelict in their duties.

After the expenditure of approximately \$60,000 of those investors' money, it was then de-

terminated that there was no law which would permit of the reorganization. Lobbyists were [555] then put to work to procure the passing of enabling legislation by the Legislature of the State of California. This was ultimately accomplished. Until approximately this time the affairs had been dominated and controlled by R. W. Starr, E. C. Thomas and J. L. Smale, and at this time J. H. Edgerton, an attorney, was added. It was still impossible to complete the reorganization because an insufficient number of consents had been obtained. To put the deal over a deal was made with Charles E. Kenner a graduate of Sing Sing prison for the misuse of other people's money and now in Folsom penitentiary for the same reason). Kenner was to obtain sufficient additional securities or consents to make the plan operative and was to receive approximately \$40,000.00 in good first trust deeds for which he had the option of trading Railway Mutual Building and Loan Securities or securities in the First Security Deposit Corporation face value for face value. At this time these securities were quoted at about 20 cents on the dollar. The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and these they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the history of this set-up reflects that every strong personality con-

nected with these companies was attempted to work for the interests of the investors was ousted.

The reorganization was finally completed with approximately 20% of the investors staying in the Railway Mutual Building and Loan Association and about 80% high pressured into the First Security Deposit Corporation. The basis of the financial structure of the First Security Deposit Corporation was three classes of stock, and a great many varieties of collateral trust bonds. The First Security was to take 80% [556] of Railway Mutual Building and Loan Association assets and liabilities and the balance was to remain. The same amount of securities in the Railway Mutual Building and Loan Association were to be turned back to them for cancellation. The Building and Loan Commissioner of the State of California designated the segregation of assets, and the best 20% remained in the Railway.

The First Security Deposit Corporation issued bonds in the sum of approximately \$1,300,000, preferred stock (A and B) in the amount of \$274,460, and common stock in the amount of \$4,488. Of the latter stock Starr, Thomas and Smale controlled about \$3,350, and this was the voting stock. In this way control was carried on and \$3,350 controlled this \$1,600,000 corporation for a period of two years. At this time, inasmuch as no dividends had been paid on the preferred stock, the preferred stock be-

came the sole voting stock. However, this made no difference as at the time of issuance of the securities every investor was requested to execute a signature card. Some refused but the huge majority complied. On the reverse side of this signature card there was printed the following, "Proxy, I hereby appoint R. W. Starr, J. H. Smale, and E. C. Thomas, or any two of them acting in accord, as my proxy to vote my shares at all meetings at which I am not present or have a subsequent proxy, for a period of seven years unless revoked earlier. No statement or condition, verbal or written, other than herein provided shall be binding on the corporation."

No notice of any stockholder's meeting was ever given other than by publication in The Daily Journal, a Los Angeles legal newspaper, and which is not read by the public at large. Therefore, for all practical purposes, the control of the corporation remained unchanged.

[557]

The assets in the segregation were finally transferred effective as of January 1, 1934. The Board of Directors of the First Security Deposit Corporation consisted of R. W. Starr, E. C. Thomas, W. S. Brayton, A. R. Ireland, C. E. Perkins and Wm. Leffert and C. H. Berry. Berry and Perkins have subsequently resigned and Brayton has died. J. H. Edgerton was attorney. J. L. Smale remained in the Railway Mutual Building and Loan Association as president.

About this time a first trust deed held on the Reed Bros. Mortuary for approximately \$42,000 was in considerable trouble. Mr. Edgerton formed the R. F. D. Discount Co. (at first a partnership and later a corporation) which was conducted and operated in his office. The interested parties were Edgerton, Starr, Smale, Thomas, Berry, Laffert, Brayton, Ireland, also Aaron Johnson and Florence Anderson who were with the Railway Mutual Building and Loan Association. The R. F. D. Discount Company purported to act as go between in the settlement of this trust deed. Reed Brothers paid \$22,000 in cash into an escrow at the Title Insurance and Trust Company, \$17,800 of this sum was paid to the First Security Deposit Corporation in settlement of all liability under the trust deed. Edgerton retained \$1,000 as attorney's fee. R. F. D. Discount Company got \$3,200 for which each of the ten persons received a \$320 interest in the R. F. D. Discount Company. The only item showing on the records of the First Security Deposit Corporation is the receipt of the \$17,800. No attorney's fee to Edgerton is shown and no approval therefor was ever given by the First Security Deposit Corporation officially.

Early in 1934, a deal was made with Battell-Dwyer Company (a stock and bond concern). They were to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid 5 points above

what they paid upon [558] delivery of the securities to the First Security Deposit Corporation. On many occasions it appeared they took more than five points, but nothing was done about it. Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was procured free on the representation that it was without value.

Included in the assets of the First Security Deposit Corporation was a house on Stearne Drive, Los Angeles, California, and was carried on its books as approximately \$7,500. Edgerton, in 1934, decided to buy the house. The First Security Deposit Corporation had acquired some of its own bonds, so Edgerton bought \$7,155.06 face value. These had been bought for \$2,206.64. Edgerton had these bonds deposited in an escrow where payment was to be made. In the same escrow, he had the papers transferring ownership of the real property deposited. In the escrow he borrowed approximately \$2,300 on the real property from the State Mutual Building and Loan Association. With this money he paid for the bonds and the costs of the escrow. The bonds were then returned out of the escrow to the First Security Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security

Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in full payment for the bonds, or a cash loss on the bond deal alone of \$185.35. Approximately one year later, the First Security Deposit Corporation took back another piece of property located at 239 21st Place, [559] Santa Monica, California. Edgerton bought this property. He sold the Stearne Drive House for about \$4,500.00 cash. From Battelle-Dwyer Company and other sources, he purchased bonds of the First Security Deposit Corporation of a face value of \$11,750. The price paid was between 30 and 40 cents on the dollar. These bonds, together with the cash sum of \$110.44 was given by Edgerton to the First Security Deposit Corporation for the property. This resulted in a book loss on the property of \$372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about \$7,000.00.

In the summer of 1934, auditors in checking bond purchases by the First Security Deposit Corporation from Battelle-Dwyer Company discovered that on approximately 1,000 shares of First Security Deposit Corporation preferred stock \$1.00 per share was added to the price charged for bonds and paid by the First Security Deposit Corporation, and the stock was delivered to Edgerton and Starr for the R. F. D. Discount Company. Battelle-Dwyer

Company refunded this money to the First Security Deposit Corporation and rearranged their deal with the R. F. D. Discount Company. R. F. D. Discount Company had now become the medium for acquiring all the stock it could of First Security Deposit Corporation. Practically its entire working capital consisted of the \$3,200 hereinbefore described. This stock carried voting control, and all of it would become very valuable if the bond holders could be chased out of the picture cheaply enough.

About this time Kenner decided he could use the Railway Mutual Building and Loan Association in some of his manipulations. He approached Edgerton for the purpose of purchasing about \$19,000 face value of securities which the First Security Deposit Corporation owned in the Railway Mutual Building and [560] Loan Association and had much to do with its control. It was arranged that the R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to the First Security for its securities in the Railway. This was done, although all holders of First Security Deposit Corporation stock were being assured by Battelle-Dwyer Company that it was worthless. Kenner then paid \$1,000 to R. F. D. Discount Company for an option to purchase the Railway securities. He didn't take up the option and forfeited his money. However, the Railway (with some assistance through the use of First Security money in pur-

chase of securities to get the necessary consents) subsequently became federalized and these securities were redeemable for 100 cents on the dollar. Sometime later P. S. Noon needed money in mining operations. He approached Edgerton and it looked like a very lucrative deal to him. He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money for him. It appears that they borrowed about \$15,000 worth of the Railway Mutual Building and Loan Association securities from the R. F. D. discount Company and hypothecated their stock in the R. F. D. Discount Company to the R. F. D. Discount Company for the return thereof. Edgerton then hypothecated the Railway Building and Loan Association securities to F. E. Jones borrowing money from him which was loaned to Noon. The mining deal failed to come up to Noon's expectations and he is now endeavoring to pay off. Another ramification will be described later. Noon is apparently 100% honest, being a court reporter of excellent reputation.

In October, 1934, Edgerton had caused the formation of the State Investors Corporation, consisting of his father and one J. L. McSwiggen (a former employee of the First [561] Security Deposit Corporation, State Investors Corporation was entirely devoid of any financial backing, yet in October, 1934, the Board of Directors of the First Security Deposit Corporation agreed to enter into a contract where-

by it would sell \$187,020.93 book value of designated real property to the State Investors Corporation. The State Investors Corporation took immediate possession of the properties and was entitled to receive all rents. It had no obligation to make any payments, other than for taxes, for one year. It could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property, or could pay in cash at the rate of 40 cents in cash for each \$1.00 of book value. This arrangement was so entirely bad and unsatisfactory to the First Security Deposit Corporation that the contract was cancelled by mutual consent after about six months.

Dar Knowled, son-in-law of J. L. Smale, purchased a property from the First Security Deposit Corporation for about \$1,000 cash. He immediately borrowed an amount from the State Mutual Building and Loan Association sufficient to return the \$1,000 and buy furnishings for the house. It is believed that the property was subsequently sold at a handsome profit. Some such deal was also made with another relative (father or father-in-law) of J. L. Smale.

Through the efforts of Battelle-Dwyer Company and others approximately \$700,000 worth (face value) of bonds of the First Security Deposit Corporation were acquired and retired, up to the time Battelle-Dwyer Company

became more or less inactive in the field. It was an extremely lucrative deal to them, a great deal of the bonds having been acquired through the trading of other securities therefor. [562]

In 1935, the Investment Finance Company was organized and operated in conjunction and out of the same office with the First Security Deposit Corporation. Its original capitalization was exceedingly small, the First Security Deposit Corporation being the main holder of stock with the purchase of \$1,000. This it still holds. Subsequently all of the R. F. D. Discount Company holdings were sold to the Investment Finance Company and the proceeds distributed and the corporation was dissolved. This included the Railway Mutual Building and Loan Association securities which had been pledged. In order to cover this item these same individuals hypothecated their holdings in the Investment Finance Company (which they had acquired by purchasing stock in the Investment Finance Company, with the money received from the sale of R. F. D. Discount Company assets to the Investment Finance Company.) Stock was put up as follows: Starr 2500 dollars, Mary Starr Brayton (widow of W. S. Brayton) 5000 dollars, Ireland 5000 dollars, Edgerton 1666 dollars, Anderson 1200 dollars, Thomas 1160 dollars. Some of the R. F. D. Discount Company holders did not put their entire receipts into the Investment Finance Company.

The Investment Finance Company has financed its operations by borrowing from the First Security Deposit Corporation. At the present time Investment Finance Company owes First Security Deposit Corporation about \$275,000 which it has borrowed on an open account not even giving notes therefor.

The Investment Finance Company has engaged in many activities most of which have resulted in frozen assets. A loss of about \$25,000 was had on an oil well deal with Kenner. This deal was consummated by Edgerton. Considerable losses were obtained in the automobile business, one [563] deal being the backing of Kenner. Deals with Kenner have cost about \$75,000.

The Investment Finance Company took over the purchase of First Security Deposit Corporation securities. It borrowed money from First Security Deposit Corporation and purchases its securities from its investors. The bonds it purchased below face value are either still held or have been turned over to the First Security Deposit Corporation at full value (including accrued interest). The stock it purchased was kept and held for purposes of control of the First Security Deposit Corporation. Letters were written to First Security Deposit Corporation investors telling them First Security Deposit Corporation was in liquidation, and so forth. One C. L. Cronk was employed for this purpose. This was over the opposition of

at least one director who stated he believed the writing of such letters was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. No attention was paid to this except that a committee was appointed to handle the matter and consisted of Starr, Thomas and Cronk. Later Edgerton succeeded Thomas. Edgerton finally decided that no letters should be written out of the State of California. The Investment Finance Company through this procedure, and through the R. F. D. Discount Company purchase, has acquired about \$100,000 par value of First Security Deposit Corporation preferred stock and about three-fourths of the common stock.

Edgerton became interested in the Western Brick Company and caused the Investment Finance Company to invest about \$30,000 therein, besides loans by the American National Bank of Santa Monica. He, Starr and Thomas, acquired some free stock for themselves in the transaction. This company [564] was revamped and the assets were sold to the Pacific Brick Company, thereby freezing out minority stockholders in the Western Brick Company. The company has operated at a loss since acquisition.

Edgerton, with Battelle-Dwyer Company, then presented a deal involving the American National Bank of Santa Monica to the Investment Finance Company. The bank had a capitalization of \$100,000 and a purported sur-

plus of about \$22,000. Assets listed consisted partially of a building valued at \$84,000 and furniture and fixtures valued at \$17,000, both actually worth not more than \$50,000, giving a real approximate value of \$71.00 per share. The Investment Finance Company purchased 100 shares at \$150.00 per share and loaned Battelle-Dwyer Company \$150.00 per share on 167 additional shares. The balance necessary to constitute control of the bank was sold to clients of Battelle-Dwyer Company after a voting trust had been formed wherein Edgerton and Dwyer were voting trustees. Battelle-Dwyer Company was unable to pay the loan, going out of business, and the Investment Finance took over the stock. The Investment Finance Company now has about \$54,000 invested in stock of the bank, and it does not seem possible that any dividends can be paid for several years. One director of the Investment Finance Company went on the bank board and stayed about two months. He claimed something was wrong somewhere in the set-up, including the management of the bank, and should be thoroughly gone over. Edgerton and Starr decided Starr should go on in the fault finders place to represent the Investment Finance Company on the bank board. Six months later, after much unnecessary money had been spent by the bank, the management of the bank changed. About two years later the bank examiners found that the building had been writ-

ten [565] up from \$1.00 to the value shown on the balance sheet and cash dividends paid on the surplus accruing from the write-up. This happened shortly prior to the advent of the Investment Finance Company into the picture. It is now necessary that additional funds be put into the bank to rearrange the capital structure to clear up the capital impairment that exists. Edgerton and Starr are now directors on the bank board.

In connection with the bank, another corporation was formed, the American Building and Investment Company. This operates in conjunction with the bank being used as a spring board. Investment Finance Company has invested about \$20,000 in this venture which has not as yet shown any huge profits.

One W. P. Bonds next came along and sold Arnold Eddy (associated with Edgerton in the California Federal Savings and Loan Association) and Edgerton on the dog food business. The Investment Finance Company decided to go for the deal. When building was discussed only one individual wanted to build on a strict contract basis. Instead it was a cost plus job had cost many times the original contemplated price. Approximately \$60,000 has been invested in this venture.

None of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme misman-

agement results in a loss to the investors in First Security Deposit Corporation between \$300,000-\$400,000.

Edgerton is attorney for all of these companies and actually runs them. He is manager of the First Security Deposit Corporation, Investment Finance Company and the California Federal Savings and Loan Association. Attorneys [566] fees paid by the Investment Finance Company and the First Security Deposit Corporation (prior to the time Edgerton became manager) for the period January 1, 1934, to April 1, 1938, were about \$15,000. \$5,000 would be excessive.

In order to qualify Miller, Hollowell, Starr and Edgerton as directors of the American National Bank, it was necessary that they have stock in the par value \$1,000 and execute affidavits that this stock belonged to them free and clear and was unencumbered in any way. The Investment Finance Company delivered to each of them the necessary stock and took from them promissory notes in the sum of \$1,500 (the amount paid for it by the Investment Finance Company). There was no intent on the part of any of them to pay for the stock. Edgerton's and Starr's stock is held in the office of the Investment Finance Company assigned in blank by virtue of a separated assignment attached to the stock for easy removal in case of inspection. The same is true of Miller and Hollowell except that it is held in a safe de-

posit box in the bank. There is a gentleman's agreement that no effort will be made to collect around the requirements of the government the notes. This is merely a subterfuge to get around the requirements of the government.' " [567]

"Mr. Lawson: * * * There is nothing in that document that would constitute its acceptance in evidence.

The Court: I will be glad to hear from plaintiff's counsel on that one particular point.

Mr. Adams: All right.

Mr. Campbell: If your Honor please, my position in this matter is very similar to your Honor's last statement; that is to say the narration of these events by Mr. Twombly constitute admissions on his part, first, as to his knowledge of those events at the time they occurred, bearing in mind the foundation which I have yet to lay; secondly, that he had knowledge of the existence of a scheme to defraud, as shown in this document, and that he knowingly joined in that scheme.

The manner in which these events are related and the substance of these events, I believe, constitute admissions against his interest in this statement.

I think that covers the plaintiff's position.

Mr. Lawson: It doesn't help me, your Honor, because that is just a repetition of the statement made yesterday. What I would like

to know, your Honor, for example, the question of knowledge, wherein does that document show that Twombly had that knowledge during the existence of the conspiracy? I don't see that."

(Thereupon the following proceedings were had in the presence of the Jury.)

PHYLLIS VORIS,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Plaintiff's Exhibit 180 for identification, attached to [568] the file of the Pierce Petroleum Corporation, is a record maintained by the Corporation Commissioner of the State of California; it is a record which is kept by the Corporation Commissioner in the discharge of the functions of his office; that it is the course of business of the office of the Commission to keep and maintain that record. My testimony would be the same with respect to plaintiff's Exhibit 12, 13, 14, 15 and 143 for identification. Those records are all kept in the regular course of the business of the State Corporation Commissioner and under my jurisdiction.

"Mr. Lawson: Those are all subject to the same objection of hearsay, not connected up and not within the issues of this case.

The Court: Yes."

C. E. WEBSTER,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

The conversation I had with Mr. Twombly with respect to the statement, plaintiff's Exhibit 216 for identification, was on the 9th day of July, 1940.

"Mr. Irwin: I think there should be the formal objections to any conversation on the ground of hearsay * * *.

"The Court: It is my understanding that you are introducing this evidence of conversation as applicable to and binding only upon the Defendant Twombly?

Mr. Campbell: Yes, I so stated yesterday.

The Court: Gentlemen of the jury, the following conversation which is apparently about to be revealed by this witness is not to be considered by you as applicable to or binding upon any of the other defendants than the Defendant Twombly.

I might say to you that it is a fundamental principle of law that a statement made by one alleged co-conspirator [569] after the termination of the conspiracy, insofar as he is concerned at least, is not in furtherance of the conspiracy, and is a mere narration of past events and past happenings, and it would seem to the Court for many generations to be very unjust to permit a man to make a statement in which he might involve a lot of his co-conspirators or co-defendants in a lot of mat-

(Testimony of C. E. Webster.)

ters and they would have no opportunity to cross examine him or to defend themselves. So that the Courts have properly, in the interests of justice, held that such statements that I have indicated are binding only as admissions upon the defendant who made them and are not applicable to the other defendants. You are so instructed."

The witness further testified: I had previously made an appointment with Mr. Twombly over the telephone to meet me at this time; and in response to the telephone conversation, he came to my office. I first handed that document to Mr. Twombly, and asked him if that was a statement which he had prepared and handed to Inspector Van Meter; he said it was. He further stated that the information contained in that document came to his attention while he was associated with the First Security Deposit Corporation and the Investment Finance Company, and that he wrote the statement from memory without having the records before him to refresh his memory, and that there might be a slight error in some of the figures in the document, but that it was substantially the facts.

"Mr. Campbell: I will now offer this Exhibit in evidence as plaintiff's Exhibit 216."

(Thereupon the Jury retired and the following proceedings were had in their absence.)

"Mr. Irwin: In the event your Honor rules that this statement may be received as to the

defendant Twombly only, I believe that a motion for a severance should be made on the following grounds: [570]

The Court: You make this motion now applicable to the time that it is admitted?

Mr. Irwin: Yes.

The Court: It may be so stipulated?

Mr. Campbell: So stipulated.

Mr. Irwin: This is a motion made on behalf of the following named defendants individually, on behalf of the Defendant Starr, Smale and Thomas. I respectfully move, on behalf of those defendants individually, for a severance from this trial on the following grounds:

That the evidence contained in plaintiff's Exhibit 216, though it is competent or might be competent as against the Defendant Twombly, is incompetent, hearsay, and prejudicial to the rights of the Defendants Smale, Thomas and Starr individually, and that its admission deprives the defendants of a fair and impartial trial to such an extent that no admonition to the jury would remove the prejudice created by the reception of that exhibit, 216, in evidence. * * *

* * * what was the situation with reference to the knowledge that such a statement might have been made by one of the defendants?

I have conferred, of course, with Mr. Lawson, and we have been cooperating together so he may want to elaborate on what I say with reference to himself.

But speaking for myself, your Honor, when the indictment was returned, and when I was retained in the case, I was advised and told by my clients that they didn't trust Mr. Twombly, that they didn't want to cooperate with him in connection with the trial because there had been considerable friction and considerable hard feelings, and that he had been discharged from the company under very [571] unhappy circumstances, they didn't wish to collaborate or to cooperate, and to watch him. That, in effect, was the admonition.

As we got into the investigation of this case, word was sent to Mr. Edgerton by mutual friends of Mr. Twombly, that his attorneys should certainly cooperate with him and that there was no hard feelings, what is gone is gone, and everybody was in the same boat, and that he wanted to get together.

Whereupon Mr. Lawson arranged a conference, I believe first which was attended only by Mr. Adams—I may be wrong in that—whether Mr. Twombly was at the first one or later. I was not at that first conference.

As I stated, this word had come to us, and we understood that Twombly had been assisting the post office inspectors in the investigation of the case. What we wanted to know—we understood that there was prejudice and hard feeling—but what we wanted to know before we considered any collaboration and likewise whether or not we should consider a motion for

severance—which had to be supported by affidavits—was whether or not Mr. Twombly had made any written statement of any kind to the post office inspectors or to the United States Attorney which would implicate or involve or cast discredit and which might be admissible in evidence in this lawsuit.

Mr. Adams advised Mr. Lawson—understand, there is no criticism of Mr. Adams; I am confident from what he tells us he is as surprised as we are—Mr. Adams told me, not once but on several occasions, that he had interrogated Mr. Twombly time after time, and that Mr. Twombly had assured him that there wasn't any, and that he, [572] Mr. Adams, was satisfied that Twombly, in fact, had made no statement.

Twombly told me he had made no statement. As late as yesterday afternoon, at the recess, when we went out in the hall, he said 'You won't find a thing damaging to your clients in that statement.'

* * * * *

I would like to submit to your Honor in this connection that those two cases show this, that it should be a matter for your Honor's consideration if the evidence were presented, either in the form of affidavits or on sworn testimony, if from that your Honor would deduce—naturally, if we had made the motion for a severance before the trial started, after the inquiry and the research we made, we would have had no grounds. We wouldn't have made any

affidavit, and wouldn't come in before the Court to make an affidavit that there was an antagonistic defense, when we were assured, No. 1, by the attorney for the defendant and, No. 2, assured by the defendant himself who, though indicted, is a member of this bar, and therefore was extended the courtesy as to other attorneys, that he would come in and collaborate on a defense weeks before the trial, and attend meetings accept our analysis of briefs and one thing and another, trade points back and forth at these meetings—in other words, there was nothing which would justify the granting of a motion for severance before this jury was impaneled. We could have made no showing to the Court.

* * * * *

I believe it is very persuasive that this statement of itself indicates that the defenses, and that are now for the first time known to us, is clearly hostile and [573] clearly antagonistic.

Now, as to the prejudicial nature, may it please the Court, even though it is restricted as to the Defendant Twombly, I will ask your Honor's consideration of this fact: Would your Honor say that in our duty to our clients, that even though your Honor restricts this statement to the Defendant Twombly, that we could go on and present the defense in this case, which would ignore, before the jury, the accusations and charges made by the defendant

Twombly? The question suggests its own answer.

For example, your Honor, we would have the burden of showing that in the fore part of that statement, Mr. Twombly leaves out that Mr. Edgerton had nothing to do with it; that Haight and Trippet were the attorneys who organized that, and that H. F. Dunton, the man who outlined the plan, had just recently resigned as Deputy Building and Loan Commissioner.

We would have the burden of showing that Mr. Twombly initiated the Pierce Petroleum loans and initiated the dog food plan.

I say to your Honor, as opposed to the question of the prejudicial nature, I think it suggests its own answer.

Doesn't your Honor, as an experienced lawyer, believe that no matter what your Honor's instruction may be, that if we didn't come back and disprove everything that he said—and another thing, your Honor, this matter before us, that isn't an admission; that is a complaint that this man initiated it. Now it appears for the first time that that is why we are here.

This man in his antagonism against these co-defendants, after he resigned, built this thing up and sent it in to [574] the postal inspector and that started it. It is not an admission; it is his complaint against these people.

Now, then, what it amounts to, I respectfully submit is a second indictment we have to meet.

It includes charges, as the Court pointed out, that are not contained in this indictment.

* * * * *

Mr. Lawson: Your Honor, might it be considered that the same motion that was stated by Mr. Irwin, that it may be made on and in behalf of the Defendants Edgerton and Ireland and on the grounds therein stated, that prejudice will result in the trial of Edgerton and Ireland, and of such character that no instruction or limitation by the Court as to proof will cure the prejudice; and as a result they will not have a fair and impartial trial.

The Court: It may be stipulated that the same motion may be deemed to be made as to those defendants.

Mr. Campbell: So stipulated.

* * * * *

Mr. Lawson: The vice in this situation is this: That the statement, as made by Mr. Twombly, is, in the form of an accusation, or a complaint against the defendants, and particularly as to the defendant Edgerton. Ninety per cent of that statement is a scripture against Edgerton in so many words; in so many words it says that he is guilty of this, that, and the other thing, stating a long series of conclusions, not a statement of fact.

Presuming for the moment that up until the time of the trial that everything was done properly; that is, a proper course of conduct was taken by counsel in regard to the protecting of

the right of the client, which I am satisfied was, and I might say, incidentally, there, that [575] I am familiar with the rule that ordinarily a motion for severance is not granted. * * * I wouldn't make that motion unless * * * I had * * * strong reasons to support my application, otherwise, we would be merely making a frivolous motion." [576]

"Here is the situation that we find ourselves in: As I stated to Your Honor yesterday, that having heard statements of a character that Twombly may have said something derogatory about the Defendant Edgerton, I believe I discussed this with Mr. Campbell and Mr. Campbell said in a jocular vein, said, 'Well, what we have on Twombly,' and so forth. I think that is a correct statement. I think in the same vein I asked him what it was, and he said, 'You will hear about that later.' Is that about the effect of it, Mr. Campbell?

Mr. Campbell: I don't recall the exact language, Mr. Lawson.

Mr. Lawson: Bearing in mind that there might be some basis there for a different defense, I went into the matter first with Mr. Adams and discussed it with him, and then I suggested that Mr. Twombly come to my office, and Mr. Adams and Mr. Twombly came to the office. I think we met at 7:30 in the evening, and left about a quarter to 12:00 or 12:00.

I took my gloves right off, and put in a very

blunt form of question, and told him exactly what I had been informed, and that I wanted to know, because if he had made the statement, well and good, that was past, and there would be no argument about it, but I wanted to know, so that the way the case should be handled would determine largely by his attitude in the case.

Now, right there, Your Honor, the difference would be this: If he was to be cooperative, as he said he would be, and if he hadn't made any statement of a damaging character against Mr. Edgerton, we rely upon that. Then we rely upon him to develop that part of the case, which is pertinent to him.

Let me make that more clear. The case, as I see it, is divided into really three parts. [577]

The case is like Gaul, it may be divided into three parts. The first part would be the organization work. That is the conversion from the old Railway Mutual to the First Security, which plan was consummated about January or February of 1934.

Then from 1934 there was a sort of a quiescent period there where nothing much was done until Mr. Twombly became general manager for the First Security, which was from November, 1934, when he became our manager until October of 1938, when he resigned, or was discharged (the statement has been made here). But, anyway, he severed his connection at that time.

Then, after that, Mr. Edgerton assumed the

general managership, and went through the process of dissolving or I mean to clean up everything and turn the assets back to the First Security, liquidating the balance in the trust and closed everything.

Now, over the period of time when Mr. Twombly was general manager is the time of the greatest activity, and as a matter of fact, every indictment letter, that is the 14 count of the indictment, I may be wrong as to the last count, but it couldn't be more than one, I think it is all 14, occurred during the time Mr. Twombly was connected with the companies.

Now, Your Honor, Mr. Twombly, as I knew, and I learned, of course, during our discussion that evening, is not only a lawyer, but he is an accountant. He kept the books during that period of time. He not only kept the books, but he made the audits, and he had complete charge, and supervision of the business during that period of time.

Now, when we discussed it that evening, because I told him very frankly, after I was assured that nothing of [578] a damaging character, no damaging statement had been made, and that he would fully cooperate, said, 'You are just the man to take care of that period, because of your particular knowledge and skill, and on all questions relating to that period we are going to look to you to take care of.' That was the understanding we had, and I relied upon it all through the preparation of the case, and during the trial of the case.

This, of course, comes like a bomb. I can't orient myself to any plan that we could conduct the case on as to Mr. Edgerton fairly, so that his interests would be protected, because that covers a period of time when the greater part of the activity occurred." [579]

"The Court: Now, let me ask you just one question: Suppose that Mr. Twombly had said to you yesterday 'Gentlemen, whether you like it or not, I have made up my mind that I am going on the stand, and I am going to answer every question that anybody asks me about this matter;' would you be in any different position?

* * * * *

Mr. Irwin: * * * The defendant can take the stand and have the opportunity of cross-examination. It comes for the first time, and he puts in his direct testimony, and it must be evidence and not conclusions. You have an opportunity to object to every question as he goes along, and he is confined to legal competent evidence. Now, this statement contained all kinds of conclusions * * * If he took the stand he would not be able to state that Starr, Smale and Thomas violated their trust, the trust of those depositors, because that is hearsay, clearly as to him. There is nothing in the books. Plaintiff's counsel hasn't shown a thing that Starr, Smale and Thomas violated their duties,

that they had been running around indiscriminately getting the security holders signed up.

All that stuff that he refers to in '31, '32, and '33, the most damaging kind of things, Your Honor, which are the rankest hearsay on his part, because he doesn't come in until '34.

I think those are two points upon which Your Honor's hypothesis may be distinguished.

Again, in that connection, his manner on the stand, the usual instruction that the jury has, our cross examination proving the falsity of his statements, providing we can, would be checked and counter checked by a [580] restriction, so that we got only competent evidence; and that the full story would be there at one time instead of going in this way that the burden is upon the defendants of taking something, which is not admitted as against them, and cannot be received as against them, and refuting the whole thing in addition to what is in the indictment.

* * * * *

The Court: * * * Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall, on the ground that it shows the state of this man's mind, in getting at the intent, when he was connected with these companies. The various things he believed, whether they were true or not, if he believed that what we might describe as monkey-business was going on there, and he

so states in his statements, it is the condition of his mind to show his intent which is being brought out and therefore the scope is broadened to that extent possibly. * * *

My only question to you is: Does it make a particle of difference whether he got it from the books, whether he got it from Kenner, whether he got it from Mr. Edgerton, or whether he didn't get it from anybody, whether he had a dream and he got it out of a dream? Is it not admissible to show what he thought, whether it was true or whether it was false?* * *

I have made up my mind that my ruling will be that there shall not be a severance. * * *

[581]

"I want, however, that counsel should be privileged to preserve the point, and I shall be willing to receive and permit them to file, for what they are worth, any affidavits that they may want, the motion having been made and by stipulation of counsel applicable to the situation just as though it had followed the testimony of this witness and the reading of this document.

Mr. Irwin: I appreciate and respect the Court's statement. Might I ask your Honor whether this wouldn't eliminate unduly encumbering the record and likewise preserve our point, that if Mr. Lawson and I were permitted to be sworn and take the oath, and then state the statement given this morning is true in all respects, to the best of our knowledge,

therefore that that would be in effect out testimony without encumbering this record with affidavits?

The Court: I am perfectly willing to have you, in lieu of affidavits. I hate to put you to the trouble of preparing those affidavits and you may both stand and be sworn and we will just put this on the record that the Circuit Court of Appeals may have it.

J. J. IRWIN and GORDON LAWSON

having been first duly sworn, were examined and testified as follows:

The Court: Was the statement that you made this morning true as to the facts which you gave in connection with the motion for severance, Mr. Irwin?

Mr. Irwin: It was, you Honor; in substance, each and every one of the facts related are my recollection.

The Court: So far as you know at the present time, there are no corrections or errors in that statement of facts?

Mr. Irwin: That is correct.

The Court: In so far as the statement purported to [582] indicate any knowledge on your part or any contact on your part, was it true?

Mr. Lawson: True, your Honor.

The Court: You have no correction to make?

Mr. Lawson: No corrections.

(Testimony of J. J. Irwin and Gordon Lawson.)

Mr. Irwin: There is this further point, which is a corollary. So it may be preserved, may it be stipulated that the motion has been made and that it is denied and exception is granted?

The Court: Yes.

Mr. Irwin: There is this other motion to-wit, the motion is now made, may it please the Court, on behalf of the defendants Starr, Smale and Thomas, individually, for themselves, that this Honorable Court withdraw a juror and thereupon declare a mistrial because of the introduction and the receipt of Exhibit 216? That is to complete the transaction.

The Court: The same motion as to your client?

Mr. Lawson: Yes, on behalf of the defendants Edgerton and Ireland.

The Court: The motion will be denied, exception.

Mr. Irwin: May it be considered, your Honor, that these motions were made in a proper sequence following the receipt of 216, and I think this point should be raised, your Honor.

The Court: Just a minute. May it be so stipulated that the motions may be deemed to be made in their proper sequence?

Mr. Campbell: So stipulated.

Mr. Irwin: Your Honor, in this connection, with reference to 216, there has never been

(Testimony of J. J. Irwin and Gordon Lawson.)

any formal objection stated on behalf of the defendants; in other words, your Honor was good enough to consider a motion for severance on the [583] assumption that it was in evidence, so whenever your Honor thinks it is appropriate, and while the jury isn't present, I think the objection should be made.

The Court: Make it right now because I am going to bring the jury down.

Mr. Irwin: Your Honor will recall that our principal contention is that this is not an admission or a confession. Your Honor appreciates that is our statement. * * * Respectfully I ask leave * * * to examine the witness Webster * * * for your Honor's determination of whether it is an admission or a confession.

The Court: You may go ahead with your voir dire examination."

C. E. WEBSTER,

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Voir Dire Examination

By Mr. Irwin:

Mr. Twombly handed plaintiff's Exhibit 216 for identification to Inspector Van Meter.

"Mr. Irwin: Your Honor, objection is made to the reception of Exhibit 216 for identification, specifically and individually, on behalf

(Testimony of C. E. Webster.)

of the defendants Starr, Thomas and Smale, on the grounds that although the offer is limited to the defendant Twombly and the evidentiary matter contained in that Exhibit is incompetent as against them, that nevertheless its being received only towards Twombly, that the nature of the Exhibit is so prejudicial to the rights of the several defendants that I have mentioned and it deprives them of a fair and impartial trial to such an extent that no admonition to the jury can or would remove the prejudice created by the reception [584] of that document.

I think I have covered the grounds. Thank you, your Honor.

Mr. Lawson: I want to join in that objection, your Honor, and add to it, on behalf of the defendants Ireland and Edgerton, that there is no evidence in the case that connects up either of the defendants Edgerton or Ireland with the scheme or conspiracy, as alleged in the indictment, and that this is an attempt by indirection to make a connection between those defendants with the scheme and conspiracy as alleged.

* * * * *

Mr. Irwin: Your Honor, I think I should add that the statement in addition is prejudicial because it contains matters which are not contained in the issues of the indictment, and that it includes matters which are clearly only hear-

(Testimony of C. E. Webster.)

say as to the defendant Twombly and could not be binding on the defendant I represent.

Mr. Lawson: I wish to adopt that and add to it that it touches on matters that have already been limited to a point, that this statement goes beyond that limitation. As a matter of fact, that it admits evidence that the Court has already ruled to be objectionable.

The Court: The objection will be overruled.

The rule of the Court is that that limitation does not apply to the offer, as limited, or are the objections sound under the offer as limited, to not only the defendant Twombly but as to the intent of the defendant Twombly."

(To which ruling of the court, an exception was duly taken.)

(Thereupon said statement was received in evidence and marked plaintiff's Exhibit 216.) [585]

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose.

You are all very intelligent men, and I believe are capable of following the directions of the Court as to the law involved and that you will do so, of course.

We have here a statement which the evidence shows was made by the Defendant Twombly on the 9th of July, 1940, some year and a half

after the conspiracy, insofar at least as the Defendant Twombly is concerned.

Mr. Campbell: Pardon me, your Honor. May I correct the Court?

The Court: Yes.

Mr. Campbell: Your Honor stated that the evidence showed that the statement was made on the 9th day of July. The testimony was that the conversation relative to the document was on that date.

The Court: Quite right. I stand corrected. I remember that now.

The witness testified that Mr. Twombly stated to him on the 9th of July 1940 that he had previously made this statement to a Mr. Van Meter.

Mr. Adams: Isn't that a little different? * * *

The Court: Well, he handed the document to him. Yes, I think probably it is.

Mr. Adams: When it was made, or where, there is no testimony.

The Court: It was made by him and handed to Mr. Van Meter.

Now I might think that John Doe and Richard Roe and Bill Smith and Mary Grab were the dirtiest bunch of crooks in the world, and I might take an action predicated upon that feeling. [586] it might not be true at all. And what I thought about these people might be no

evidence at all as to what they actually were, or as to what I thought had occurred.

We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, as against any defendant in this court room, including the Defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that.

To illustrate: Whether or not those things were true or false would be immaterial so long as the Defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances.

Now it is very important, in all fairness to these other defendants and to the Defendant Twombly himself, that this document, which contains statements about a lot of different matters, is only admitted for the purpose of showing Twombly's intent, and is no evidence whatsoever, and must not be considered by you, as to the truth of the statements made in this communication.

Now we can't try every defendant by himself and go very well through several different trials occupying several weeks. We can't always permit that. We do permit it under certain circumstances where we feel that there is no other course to pursue.

We have felt it possible to try these defendants together. We still feel so. And I shall have occasion again to call your attention to this limitation, but I wanted to put it in very definite terms to you before it was read. [587]

You may proceed.

Mr. Adams: Pardon me, your Honor. That document has been received subject to those objections and a motion to strike?

The Court: Subject to the objection and the motion.

Mr. Irwin: Pardon me a second. I don't remember if we were given an exception to the objection.

The Court: Yes, Exception as to all of them." [588]

(Thereupon said plaintiff's Exhibit 216 was read to the Jury. Said Exhibit has been set forth hereinabove in full in connection with the arguments had concerning its admissibility.)

C. E. WEBSTER,

resumed the stand and further testified as follows:

I secured certain books and records from the Security Deposit Corporation. Plaintiff Exhibit 217 for identification is the file marked "Valerie Mountain," which came into my possession in the course of my investigation; I obtained that file from the offices of either the First Security Deposit Corpo-

(Testimony of C. E. Webster.)

ration, or the Investment Finance Company, which are conducted jointly at Wilshire and Houser Boulevard, Los Angeles. The two documents which you show me were in the file, plaintiff's Exhibit 217 for identification, when it came into my possession.

(Thereupon, the plaintiff offered in evidence one of said documents marked plaintiff's Exhibit 218 for identification, the same was received in evidence over the objection that the same was hearsay, no proper foundation laid and immaterial, and an exception was duly taken.)

Said Exhibit is in words and figures following:

[589]

"I will read plaintiff's Exhibit 218:

'March 2, 1934.

J. L. McSwiggen:

You are authorized and directed to complete the Knowles deal this afternoon. Do this without fail.

Miss Long will give you sufficient bonds to cover same.

R. W. STARR.'

Mr. Adams: Your Honor, may I interrupt again before he goes on?

Your Honor, I think that instruction to the jury should be amplified in this, that it likewise does not come within that portion of the indictment—and now I am reading again in the lower left-hand corner of page 20—with reference to the letters, your Honor, that the defendants represented and pretended that it was or-

ganized for the purpose of duly engaging in liquidation, and so on.

Now as to that, on the next page of the bill of particulars, Item 8, and the Court's ruling, in answer to that the plaintiff has set out the matter on page 22 and 23, and I call your particular attention to page 23, line 25, 'The plaintiff will refer to approximately 36 letters,' written at certain dates.

And then on page 24 and 25 are the letters so indicated. Certainly this letter to Mr. McSwiggen and the other letter that counsel is now offering are not within that portion of the indictment.

The Court: The jury is instructed that the last exhibit called to their attention, which was just read, is not to be considered as binding upon or applicable to the Defendant Twombly insofar as this allegation in the indictment is concerned: [590]

'That the said defendants at all times represented and pretended that said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of the said assets received by it from the Railway Mutual Building and Loan Association; whereas in truth and in fact the defendants, and each of them, then and there well knew that no such liquidation was, in fact, being carried into effect and the said defendants

were, as hereinabove alleged, converting said assets to their own use and benefit.'

Mr. Campbell: I am now going to read from plaintiff's Exhibit 24 of the books and records of the First Security Deposit Corporation.

I am reading from the journal, page 80, of Exhibit 24, the journal of the First Security Deposit Corporation.

'A debit item of \$2,155.87, August 3, profit and loss on real estate sold, O. T.

A debit of \$88.72 reserve for depreciation.

A credit of \$2,244.59, with the statement, "Real Estate No. 878, R-126, sold to R. D. Knowles, cash in amount of \$822.50 received on deal, \$11.17 to pay repair costs and balance of \$811.33 as full payment of deal, Mr. Knowles paying taxes and assessments due." ' ' ' [591]

DENNIS S. TAYLOR,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Prior to the year of 1932, I was an investor of the Railway Mutual Building and Loan Association.

"The Court: Is this another one of the investors?

Mr. Campbell: This will be the last one.

The Court: Same objection as to all defendants; same ruling."

(Testimony of Dennis S. Taylor.)

I transferred or exchanged my holdings in the Railway Mutual Building and Loan Association into the securities of the First Security Deposit Corporation at or about the year 1932; thereafter, from time to time I received communications from the First Security Deposit Corporation and from the Investment Finance Company. I received plaintiff's Exhibit for identification 168, a letter dated January 26, 1938, through the mail.

"Mr. Campbell: This will be offered as plaintiff's Exhibit 168.

Mr. Irwin: Same objection, the same ruling went as to all defendants as to this line of testimony.

The Court: Yes."

(Said letter was received in evidence and marked plaintiff's Exhibit 168, and is separately certified pursuant to stipulation and order of Court.)

The witness further testified: I have received plaintiff's Exhibit 160, a letter dated July 1, 1938, through the mail; at the time I received it, it was in an envelope. There was a cancelled postage on that envelope.

(Said letter was received in evidence and marked plaintiff's Exhibit 160, and is separately certified pursuant to stipulation and order of Court.)

The witness further testified: I received plaintiff's [592] Exhibit 165 for identification, a letter dated October 26, 1938, through the mail; it was inclosed in an envelope, which envelope bore my name and address on its face; there was cancelled

(Testimony of Dennis S. Taylor.)

postage on the envelope. I did not keep the envelope; I destroyed it. My testimony in regard to plaintiff's Exhibit 165 for identification would apply to plaintiff's Exhibit 160, as to the envelope.

(Said letter, plaintiff's Exhibit 165 for identification was received in evidence, said Exhibit is separately certified pursuant to stipulation and order of Court.)

Cross Examination

By Mr. Irwin: [593]

Q. Now, the securities that you had in the First Security Deposit Corporation, which you received in exchange for your securities in the Railway Mutual, consisted of a \$1100 full paid prior bond of the First Security; and a cumulative prior bond in the amount of \$86.08?

A. The first, yes. Series A.

Mr. Irwin: May our stipulation be in effect as to this man too, Mr. Campbell?

Mr. Campbell: I think we can enter into a general stipulation. Interest of the First Security Deposit Corporation on those securities, on which they were required to make semi-annual payments.

By that I don't mean that they were always paid on the date due but all interest was paid.

Mr. Irwin: That is perfectly satisfactory.

The Court: The stipulation may be received.

Mr. Irwin: Except in the individual cases where we may want to state the amounts, as the record shows, subject to correct.

(Testimony of Dennis S. Taylor.)

By Mr. Irwin:

Q. Mr. Taylor, you sold those securities in October 1938 for \$1,008.16, is that right?

A. Yes.

Mr. Irwin: Then, your Honor, pursuant to stipulation, I desire to state that the record shows that on the full paid bond the witness had received, up until that time, \$363.00. By way of interest. And he sold the full paid bond in the face amount of \$1100, and the cumulative in the amount of \$86 for \$1,008.16, as he has testified, on October 28, 1938.” [594]

(It was stipulated that the bonds referred to by the witness Taylor had a maturity date of November 1, 1942.)

(It was further stipulated that with respect to the witness Walker, who testified that he did not receive all interest payments on his bonds, that the records of the Company showed that he received all interest on his bonds.)

“Mr. Irwin: Then may I state the amount, because he had not given the amount, and I wanted to recapitulate at this time.

The Court: Yes.

Mr. Irwin: The witness testified, Mr. Walker, that he had a full paid bond in the face principal amount of \$700, and a cumulative non-prior face principal amount of \$113.21; that he sold both of those for \$691.72, and pursuant to the stipulation the books show that he received over the period of time from

the full paid bond the amount of \$231.00 in interest."

(It was thereupon stipulated that defendant's Exhibits "R" and "S" for identification, two documents withdrawn from the file, plaintiff's Exhibit 217 for identification, be received in evidence as part of the cross examination of the witness Dennis S. Taylor.)

(Exhibit "R" is hereinafter set forth and Exhibit "S" is separately certified pursuant to stipulation and order of Court.) [595]

"Mr. Irwin: Reading Defendants' Exhibit R:

‘January 26th, 1938.

‘Mr. Dennis S. Taylor
6185 Springvale Drive
Los Angeles, California

Dear Sir:

You hold securities of the First Security Deposit Corporation, Bond A-1350 in the amount of \$1100.00, and A-2423 \$86.06, and we are able at this time to obtain for you \$830.25 on same.

Please present these securities for payment, or if you prefer, take them to your bank, endorse by yourself and Mollie Taylor before witness, and draw a draft on us for this amount through the Dunsmuir and Wilshire Branch of the Bank of America.

You will recall that the First Security Deposit Corporation was organized to

liquidate a large portion of the assets of the old Railway Mutual Building and Loan Association over a period of time to the best advantage of the depositors. It is my understanding had this not been done, the situation would in all probability have been liquidated under a forced liquidation with its incidental low prices by the building and loan commissioner.

Furthermore, I feel that the gentlemen who have had charge of this corporation have done a splendid piece of work in bringing about a condition where we are able to obtain seventy cents on the dollar for the bonds.

In other words, you can obtain \$830.25 for your bonds now, or wait approximately six and one- [596] half years and take your chances on obtaining more out of what is left of the assets after over \$900,-000.00 has already been liquidated.

This offer is good until February 15th, 1938.

Yours very truly,
INVESTMENT FINANCE
COMPANY,
By C. L. CRONK.' " [597]

"Mr. Campbell: At this time I wish to renew my offer of plaintiff's Exhibits 180 and 181, which are the letters and the minutes of the stockholders meeting of the Pierce Petroleum Corporation.

Mr. Adams: I had previously made an objection, and I renew the objection at this time on the ground of no foundation laid, not material, hearsay, as to the defendant Twombly.

The Court: The objection will be overruled, exception allowed.

Mr. Irwin: Your Honor, we had interposed an objection. Would the same objection go on the ground of hearsay as to my client, and immateriality?

The Court: That objection will be overruled as to your clients and as to Mr. Lawson's.

Mr. Irwin: Exception."

(Said documents were received in evidence and marked plaintiff's Exhibits 180 and 181.) [598]

"Mr. Campbell: I wish to read these two exhibits into evidence.

Plaintiff's Exhibit 180, a letter dated January 3, 1936, and bearing the reception stamp of the State Corporation Department, 'January 4, 1936.'

'Pierce Petroleum Corporation
208 Pacific Electric Building
Los Angeles, California

Gentlemen:

Whereas an agreement was entered into between your company and the Investment Finance Company on November 16, 1935 wherein your corporation agreed not to issue any stock in addition to the five shares theretofore issued without the writ-

ten consent of this organization, and certain escrow instructions were entered into on the same date between your company and this with the same provision contained therein, and

Whereas, we have been advised that you have filed an application with the Department of Investments, Division of Corporations, State of California, for the issuance of 1995 shares of stock to George A. Boedecker, J. H. Edgerton and C. W. Twombly, we wish to advise you at this time that you may consider this letter as our written authority for allowing said stock to issue, and a copy of this letter will be forwarded to the Department of Investments, Division of Corporations, State of California, and to the Western Trust and Savings Bank at Long Beach, California, so that they may have notice thereof.

This shall in no manner change any of the [599] other terms or conditions of the said agreement and the remainder thereof shall subsist and be carried into effect as originally written.

Yours very truly

INVESTMENT FINANCE
COMPANY

By J. H. EDGERTON
Vice-President.

By C. W. TWOMBLY
Secretary.

We hereby consent to the above.

Pierce Petroleum Corporation

By J. H. Edgerton President.

By C. W. Twombly Secretary.'

Plaintiff's Exhibit 181, minutes of stockholders' meeting.

'Minutes of annual stockholders' meeting of Pierce Petroleum Corporation, Inc., held at the principal office of the corporation, 415 South La Brea Avenue, Los Angeles, California, on February 19, 1937, at 3:30 o'clock p.m.

The following stockholders were present in person:

George A. Boedecker—100 shares.

J. H. Edgerton—200 shares.

C. W. Twombly—100 shares.

Stockholders present by proxy:

Investment Finance Company, a corporation, 5 shares;

The above 405 shares is the total outstanding stock issued by the corporation.'

I will not read the remainder of these minutes. They are signed, 'J. H. Edgerton, President; C. W. Twombly, Secretary.' " [600]

"Mr. Campbell: Now reading from plaintiff's Exhibit 42, the journal of the Investment Finance Company, reading from page 204 of such journal:

A debit item of \$24,369.80, loss on Pierce Petroleum well No. 1.

'To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claim against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250 cash.'

I will not read the remainder of this item, it not being material.

Mr. Irwin: Did we get a date on that, may it please the Court?

Mr. Campbell: The item is dated December 31, 1939, and is set forth on page 204 of plaintiff's Exhibit 42. The following debit items:

'Suspense, \$2,250. Reserve for depreciation oil well equipment, \$1,844.44, unearned discount accounts purchased, \$2,653.18, unearned income on service rendered, \$435.18, deposit Signal Hill Water Department, \$150.00. Loss on Pierce Petroleum Well No. 1, \$24,369.80.' The following credit items:

'Accounts receivable, Pierce \$2,696.27, oil well equipment, \$10,000; notes receivable, Pierce, \$19,006.33. To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claims against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250.00 cash. Deposit consists of \$150.00 deposited

with the [601] Signal Hill Water Department by the Pierce Petroleum Corporation, which is to be withdrawn and refunded to this company on February 15, 1939 as per agreement in file.' " [602]

Thereupon a motion to strike said minutes read from plaintiff's Exhibit 42 was made and the following proceedings were had in connection therewith. [603]

"Mr. Lawson: The only question—not the only question, but in connection with this particular matter—this has to do with whether or not the operation resulted in a profit or loss. I may be under a misapprehension, but I understood it was limited merely to the contribution of that particular company.

Am I in error in regard to that, or has he opened the gates here now to a question as to whether or not this company operated at a loss or profit, and if it operated at a loss, is that material evidence in this case?

The Court: Well, all he is doing is reading what the books show. Now I think you are entitled, as part of your case, to show what the actual situation was, either that the actual situation was not as shown by the books, or that the entry is misleading.

Mr. Lawson: I don't know whether I made myself clear, but the point I am trying to establish is, is it material in this case as to whether or not the Pierce Petroleum Company turned

out to be a loss or a profit? Are we here charged with not making a profit, that there was a loss sustained on this particular investment? That is the point.

The Court: I have felt, as to most of these corporations A to Z, that it didn't make any difference, under the allegations of the indictment.

Mr. Campbell: If the Court please, the reading of the item is to show, not so much the making of a profit or loss, but simply the history of the transaction and the closing out of the transaction so far as the company is concerned.

In other words, rather than leaving the fact of the investment in the air, it having been a matter determined during the course of the enterprise, I think we are entitled to show what the books reflect historically in regard to that [604] particular investment.

Mr. Lawson: I don't doubt the sincerity of Mr. Campbell's statement, but plain implication to me is the fact that a loss was sustained, and that is emphasized, and we are being penalized because—

The Court (Interrupting): I think there may be something in your position. I think Mr. Campbell's position is also sound. It may be that I should give a special instruction to the jury on it at this time.

Now in order to be sure that the jury have in mind this matter, because we have had so

much discussion, I am going to trouble Mr. Campbell to read that item once more, and then I will make a brief comment about it to the jury.

Mr. Irwin: Your Honor, in reply to Mr. Campbell's statement, before he reads it, he said he did not want to leave the investment in the air. That is my objection. We haven't had the entire history of the investment." [605]

(Thereupon said minutes in plaintiff's Exhibit 42 were again re-read to the Jury.)

"The Court: Gentlemen of the jury, I think I will strike that entire entry just read and instruct you to disregard it entirely, and not to be in any way prejudiced by it. I think, on more mature consideration and on the specific objections being made, it might be misleading, and it might be prejudicial.

Mr. Campbell: If the court please, I wish at this time to read from plaintiff's Exhibit 39, a portion of the books and records of the Investment Finance Company, appearing on page 7 thereof.

Mr. Lawson: I am just wondering if counsel has laid a foundation to show that the loans —these are accounts receivable and apparently are evidence of loans—as to whether or not the defendants had any interest in the company at the time the loans were made. Has the foundation been laid for that?

Mr. Irwin: I was going to say, in that connection I was going to move to strike what

counsel is about to read, since the exhibit is already in evidence, and the only evidence that we have so far is Exhibit 181, which was just read, showing the parties in question, Mr. Twombly and Mr. Edgerton, which your Honor admitted, and which shows they appeared as stockholders in February 1937. Therefore I shall move to strike that exhibit which he proposes to read on the ground that it is immaterial.

Mr. Campbell: I think, if the Court please, this matter was thrashed out the other day, at which time it was stated by the Court that we would be permitted to show the nature of the investments made, and I propose to show these entries as to the making of loans to the Pierce Petroleum Corpora- [606] tion.

The Court: Well, if that is the object, it is to show simply that the Investment Finance Company did make investments in Pierce Petroleum, and then that comes within the terms of the indictment and is admissible.

Mr. Lawson: While your Honor is reading that, I would like to have your Honor have my point in mind, that I understood that it was all predicated upon an interest by the defendants in the Pierce Petroleum at the time that the loans were made. That was my understanding of your Honor's ruling the other day.

The Court: I think this was the basis of my ruling as to these corporations A to Z, which were corporations we so described as being

those in which Investment Finance Company had made a stock investment or to which it had made loans. My statement was that unless there was a showing, a foundation showing, that the directors of Investment Finance controlled those corporations, or possibly under certain circumstances had a heavy personal interest in those corporations, that the only thing we would be interested in here as relevant to the issues involved would be the fact that there was such investment and the general type of corporation in which the investment was made, that where the directors had a controlling interest, that it might be proper to go further in order to give the jury items from which they might pick up intent. I think that was the basis of my ruling.

Mr. Lawson: Yes, your Honor, but I thought it was limited to the time when the control was exercisable and that the loan must have been made at that time. That is if the control or interest was obtained at a time subsequent to the investment, it would be immaterial.

The Court: I think I also went that far and I said that the Government would have to convince me of the connection of [607] where there was an investment to-day and some time subsequently a control was taken over. In other words, if there was a considerable period of time intervening between the two; it might be a perfectly natural development that they

had made an investment and they put men in there to safeguard it.

Mr. Irwin: That is the situation here, your Honor, if you will look at Exhibit 181, which was read a moment ago.

* * * * *

Mr. Adams: Your Honor spoke of a matter where there was a long interim from the time the loan was made, and until the time, until anybody representing the Investment Finance Company went into control, or the directors of the Pierce Petroleum, that that could be shown.

Now, this Exhibit No. 181, from which Mr. Campbell read, to which I reserved the right to read, he was reading from the minutes of February 19, 1937, at which time it was shown that Mr. Twombly and Mr. Edgerton had assumed a stock interest.

Now, back in the minutes of 1935—

Mr. Campbell: I don't know what counsel has in mind with reference to the minutes which are not here in evidence.

The Court: I think I understand your point, but that is part of your case, and when the time comes you may put those all in to show the situation. Counsel for the Government is entitled to put in his case as he deems best, as I have indicated many times.

Mr. Adams: I understand that.

The Court: And so long as there is nothing there that seems to the Court to be confusing

or improperly prejudicial, unnecessary, he is entitled to put it in as the books show.

Now, as a part of your case, you may show certain circumstances which take the curse out of that particular piece of evidence. [608]

Mr. Adams: I understand your Honor said that Mr. Campbell could not put in evidence of Companies A to Z unless he would show the time the loan was made. He should show the time the loan was made.

The Court: Pardon me. I just repeated what I said a short time ago. He is entitled to show from the books of the Investment Finance Company, that contrary to the representations made by these men to investors, instead of liquidating, they made investments in these various organizations, and it doesn't make any difference who controlled it.

The point there is not that they were making investments to themselves, directly or indirectly, but that they weren't liquidating, they were investing in oil wells, or banks. You see?

Mr. Adams: Yes.

The Court: He is entitled to show that. You are entitled to explain that, as a part of your case. Now, that has nothing to do with the point alleged in the indictment that they were, in effect, loaning money to themselves.

Now, let me illustrate. I don't know that there is anything of this kind in the entire case, but suppose there was a John Doe Corporation which was owned and controlled by

three of these defendants and they showed that these moneys were loaned to that corporation. They would then be entitled to show the additional fact that these defendants owned that corporation, and that it was a loss. Now, those are items which go to show the intent; they are items of circumstantial evidence. They are items which the jury would be entitled to consider, but before he can go beyond the investment, as shown by the books, he has to lay some foundation to satisfy me before I will let that evidence in that there was a loss, that there was a direct connection between these defendants and that corporation. [609]

Mr. Adams: That is what I think he is not doing. In other words, your Honor said he must do certain things before he can do other things. In other words, he is going at it backwards. He attempted first to show a loss. He is attempting, secondly, to show——

The Court: We took that out. If there was any implication of loss in there I got rid of that. For that reason I didn't think it was proper, but this entry, as I see it, is simply a narrative of the investments of the corporation.

Mr. Adams: Then did he not go backwards in this: He has introduced here the minutes which are two years after the matter he is now going to read, to show that some of these defendants had an interest in this company.

Now, I say that the orderly fashion of proof

was to follow what you said. First, he must show an investment: then if he can show that the defendants were interested he could then show a loss. That is what I understood you to say.

The Court: Let me take those minutes. Will you approach the bench, please."

(The following proceedings were had at the bench outside the presence of the Jury.)

"The Court: This Exhibit 181, which he read, is dated February 19, 1937.

Mr. Adams: Yes.

The Court: Now, let me see that entry there.

Mr. Irwin: December 31, 1935.

Mr. Adams: It is December of '35. There is some 14 months difference, your Honor.

The Court: This says, 'Unearned discount on accounts purchased to set up \$21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per [610] cent from date) to cover indebtedness to Investment Finance Company for \$15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation—\$1,000 chattel mortgage, L. No. 24 from Charles E. and Maryan A. Kenner—\$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—\$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in ledger)—services rendered by C. W. Twombley and J. H. Edgerton for Invest-

ment Finance Company, amount of \$435.18 balance credited to Unearned Discount on Accounts Purchased, \$27,616.99.'

Now, I deem that that is simply a reflection of the investment which was made. It shows this investment. Now, that I deem to be proper for that reason. There is nothing there that is confusing. There is nothing there that is prejudicial.

Mr. Irwin: I believe there is, your Honor.

The Court: There is nothing there that would deceive the jury, as I see it.

Mr. Irwin: I believe there is. As I see it, the reason they are putting this one in is the statement was read yesterday about Kenner and his San Quentin record. Now, this is a conclusion. Here it is set up as an asset. This doesn't show the date the loans were made. It refers to the fact that loans had previously been made to pay off those debts. Now they read the final entry setting it up as an accounts receivable. Isn't that true? They are using this description, which is a conclusion, as to what they got for the money they loaned out. That doesn't show the money lent out, and the prejudicial nature is in showing Kenner's figure in there in the light of that statement which was read yesterday.

Again I submit it is misleading. [611]

Mr. Lawson: That was long prior to any transaction of the Pierce Petroleum Company.

* * * * *

Mr. Irwin: Does your Honor have this in mind: You stated there are two theories, one that they made loans which are not approved; and the second one, loans in which they had interest. Obviously, this doesn't come inside the loans in which they had interest. This comes under the head of the unwarranted loans, not being under the standards set forth, that is true. Shouldn't we stop by just showing the bare loans instead of reading that description? Instead of reading that description, why not show the loans—

The Court: I don't know what is coming in. You still have your motion to strike. I may take this out yet."

(The following proceedings were had in the hearing of the Jury.)

"Mr. Campbell: Reading now from plaintiff's Exhibit 39, the cash journal of the Investment Finance Company, from page 7 thereof.

‘December 17, 1935.

Notes receivable — Pierce Petroleum, debit \$2100; income from service rendered, credit, \$435.18; unearned discount on accounts purchased, credit \$2,564.82; to set up \$21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per cent from date) to cover indebtedness to Investment Finance

Company for \$15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation — \$1,000 chattel mortgage L No. 24 [612] from Charles E. and Maryan A. Kenner—\$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—\$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in ledger)—services rendered by C. W. Twombly and J. H. Edgerton for Investment Finance Company, amount of \$435.18 balance credited to Unearned Discounts on Accounts Purchased.'

The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned.

Mr. Adams: Now, with your Honor's permission, I would like to read from plaintiff's Exhibit 181, being the two pages which I understand have now been introduced and being the minutes of the stockholders' meeting:

'Minutes of annual stockholders' meeting

of Pierce Petroleum Corporation, Inc., held at the principal office of the corporation, 415 South La Brea Avenue, Los Angeles, California, on February 19, 1937, at 3:30 o'clock P. M.

The following stockholders were present in person:

George A. Boedecker	—	100 shares
J. H. Edgerton	—	200 shares
C. W. Twombly	—	100 shares

This is the part he didn't read:

'Stockholders present by proxy:
Investment Finance Company, a corporation, — 5 shares;

The above 405 shares is the total outstanding stock [613] issued by the corporation.

The President asked the Secretary to report on the financial condition of the corporation and the present condition of Lightburn Community No. 1 Well, and the trial balance annexed to these minutes and marked Exhibit "A" was submitted by the Secretary.

A general discussion followed, at which time Mr. Edgerton produced a letter received from the Investment Finance Company, a corporation, and signed by Dr. R. W. Starr, its President, to the effect that payment of the obligation owed by this company to the Investment Finance Company, by virtue of two promissory

notes secured by chattel mortgage dated January 29, 1936, would have to be paid in full immediately, and containing the further information that the said indebtedness was in the amount of \$29,006.33. The letter further stated that no additional funds would be advanced by the Investment Finance Company for the maintenance or operation of Lightburn Community No. 1 Well. The original of this letter is attached hereto, made a part of these minutes, and marked Exhibit "B".

Mr. Edgerton stated that in view of this demand by the Investment Finance Company for payment of its obligation, there was a conflict of interests between this company and the Investment Finance Company, and it would not be feasible for him or Mr. Twombly to serve as directors and officers of both corporations. Mr. Boedecker was requested to suggest the names of additional persons who could satisfactorily act as directors of the Pierce Petroleum Corporation for the ensuing year. [614]

Nominations were thrown open for directors of the corporation, and the following persons were nominated by George A. Boedecker:

George A. Boedecker
Bundy Colwell
Mildred Hargraves.

Upon motion of Mr. Twombley, seconded by Mr. Boedecker, it was unanimously resolved and carried that the stockholders cast a unanimous ballot in favor of the three nominees as directors of the corporation for the ensuing year.

It was suggested by Mr. Edgerton that the new board of directors make every effort to obtain a purchaser for Lightburn Community No. 1 Well, in as much as it was apparent that the Pierce Petroleum Corporation would never be able to repay the amounts owed by it from proceeds derived from the operation of the well.

On motion duly made and carried, the meeting adjourned at the hour of 5:00 o'clock P. M.

(Signed) J. H. EDGERTON,
President.

C. W. TWOMBLY,
Secretary.'

Mr. Campbell: Now in view of the reading of those minutes, if the Court please, I at this time wish to renew my offer of the portion of the books of the Investment Finance Company heretofore read and stricken by your Honor.

The Court: I will take that under advisement.

Mr. Campbell: * * * I wish to renew my offer of plaintiff's Exhibit 10, being the application of the Pacific Brick Company, a cor-

poration, for a permit to issue its stock [615] * * * and which bears the signature of the defendant J. Howard Edgerton.

Mr. Butler: I object to it at this time on behalf of the defendant Cronk, that no foundation has been laid, that it is hearsay and immaterial.

Mr. Irwin: I wish to make the same objection, your Honor, and in addition thereto add the one that it doesn't tend to prove or disprove—I think that comes under materiality—any issue, * * *.

Mr. Lawson: I adopt all those objections and add to it that it has not been connected up, and the foundation has not been laid in this sense of the word—not as to the competency, as far as the signature is concerned—but I don't know of anything that has been developed by the Government in this case that has added to the facts which would show and which would come within the limitation or definition of your Honor, nothing in addition in the way of control or stock interest.

The Court: I just went over these minutes, and I am going to permit them over the objection, exception allowed, subject to a motion to strike.

Mr. Lawson: Exception.

Mr. Campbell: This date is June 9, 1937—I beg your pardon. The document is verified on the 27th day of May, 1937. I wish to make the same offer with reference to plaintiff's Ex-

hibit 11, which is the application for amendment to permit.

The Court: The same objections may be deemed to have been made to this, same ruling, same exception. It may be admitted and marked next in order and read to the jury.

(Thereupon said documents referred to were received in evidence and marked respectively plaintiff's Exhibits 10 and 11.) [616]

"Mr. Campbell: I will read these two at this time. Plaintiff's Exhibit No. 10:

**'BEFORE THE DEPARTMENT OF
INVESTMENT**

Division of Corporations
of the State of California

In the Matter of the Application of Pacific Brick Company, a Corporation, For a Permit Authorizing It to Sell and Issue Its Stock.

State Corporation Department
Received June 9, 1937.
Los Angeles Office.

65673 LA

LA 22919

To The Honorable, The Commissioner of Corporations of the State of California.

Pursuant to the provisions of the Corporate Securities Act of the State of California, the undersigned, Pacific Brick Com-

pany, a corporation, hereby makes this its application to the Commissioner of Corporations of the State of California for leave to issue and dispose of its securities in the manner hereinafter set forth.

The application of Pacific Brick Company respectfully shows:

That Pacific Brick Company is a corporation duly organized under and existing by virtue of the laws of the State of California, its Articles of Incorporation having been duly filed in the Office of the Secretary of State on the 21st day of May, 1937, as will hereinafter more particularly appear. [617]

II

(1) That the names, residences and postoffice addresses of the officers and directors of applicant are as follows:

Name	Office	Address
J. Howard Edgerton	President and Director	Los Angeles, Calif.
F. A. Anderson	Vice-president and Director	Los Angeles, Calif.
M. F. Hargraves	Sec'y Treasurer & Director	Los Angeles, Calif.
E. C. Thomas	Director	Los Angeles, Calif.
Vivian Howatt	Director	Los Angeles, Calif.

(2) The location of the principal office of the applicant is 2526 Colorado Avenue, Santa Monica, California.

(3) An itemized account of applicant's financial condition is not annexed as an exhibit to this application, because applicant is a newly organized corporation and has not as yet conducted business and has no tangible assets and only those liabilities incurred as an incident to its incorporation.

(4) The plan upon which applicant proposes to conduct its business is as follows:

To purchase approximately twenty (20) acres of real property located in the City of Santa Monica, County of Los Angeles, State of California, and to take clay therefrom and manufacture common bricks and other clay products, and to distribute and sell the same in accordance with the general practices of brick and tile manufacturing concerns.

(5) Applicant at this time intends to issue common and preferred stock in accordance with the Articles [618] of Incorporation, a copy of the proposed form of the common stock being attached hereto, made a part hereof and marked Exhibit "A", and a copy of the proposed form for the preferred stock being attached hereto, made a part hereof and marked Exhibit "B".

(6) Applicant alleges that no contract is proposed to be entered into concerning the sale of its securities.

(7) Applicant alleges that no pros-

pectus or advertising or other descriptive matter concerning the securities of applicant is to be distributed or published.

(8) Annexed hereto and marked Exhibit "C", is a copy of applicant's Articles of Incorporation, and applicant alleges that same were filed in the office of the Secretary of State on the 21st day of May, 1937, and that since said date no amendment has been made to applicant's Articles of Incorporation, and that they now exist as set forth in Exhibit "C" above referred to.

Applicant further alleges that a certified copy of said Articles was filed in the office of the County Clerk, County of Los Angeles, on the 26th day of May, 1937.

(9) Applicant proposes to issue and dispose of its securities immediately upon issuance of your permit.

(10) Applicant proposes to issue and dispose of 50,000 shares of Common Stock of an aggregate par value of \$50,000, or a par value per share of common stock of one dollar (\$1.00) each. [619]

(11) Applicant proposes to issue and dispose of 50,000 shares of Preferred Stock of an aggregate par value of \$50,000, or a par value per share of preferred stock of one dollar (\$1.00).

(12) Applicant does not propose to pay any commission or compensation for the issuance or disposition of its securities.

(13) A copy of all the minutes of any proceedings of applicant's directors or shareholders, relative to or affecting the issuance of all securities for which permission is hereby petitioned, is hereto annexed and marked Exhibit "D".

(14) Applicant's By-Laws are hereto annexed and marked Exhibit "E", and applicant alleges that same have not been amended.

(15) Applicant does not name a registrar, transfer agent or escrow holder, believing same unnecessary.

III

That the persons interested in the organization of the applicant corporation, to whom the applicant proposes to sell its stock, are as follows:

E. C. Thomas,
J. H. Edgerton,
M. F. Hargraves,
F. A. Anderson,
Vivian Howatt,
A. R. Ireland,
J. L. Smale,
R. W. Starr,
W. S. Brayton,
William Leffert,
Harry A. Neyer,
Ralph Edgington,
F. E. Jones
Lloyd R. Massey,

Wherefore, applicant prays that you permit issue, authorizing applicant: [620]

(1) To issue and dispose of 50,000 shares of its common stock of a par value of \$1.00 per share, to the persons named in this application, for a cash consideration of \$1.00 per share.

(2) To issue and dispose of 50,000 shares of its preferred stock of a par value of \$1.00 per share, to the persons named in this application, for a cash consideration of \$1.00 per share.

(3) That said permit be subject to such conditions as you deem desirable and expedient to impose.

Respectfully submitted,

(Signed) PACIFIC BRICK
COMPANY,

a corporation,

By J. H. EDGERTON,
President.

By M. F. HARGRAVES,
Secretary-Treasurer.

State of California,
County of Los Angeles—ss.

J. H. Edgerton and M. F. Hargraves, being by me first duly sworn, depose and say: that they are President and Secretary-Treasurer, respectively, of the above entitled corporation; that they have read the foregoing application for permit to issue stock and know the contents thereof; and

that the same is true of their own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that they believe it to be true.

(Signed) J. H. EDGERTON

M. F. HARGRAVES.

Subscribed and sworn to before me this
27th day of May, 1937.

ALYCE CROSBY [621]

Notary Public, in and for the County of
Los Angeles, State of California.'

To which is attached Exhibits, copies of stock certificates, minutes of the first meeting of the Board of Directors of Pacific Brick Company, and By-laws of the Pacific Brick Company.

Reading now plaintiff's Exhibit No. 11:

'BEFORE THE DEPARTMENT OF
INVESTMENT

Division of Corporations
of the State of California

In the Matter of the Application of Pacific Brick Company

For a permit authorizing it to sell and issue its securities.

No. 56573LA

Application For Amendment to Permit to
Issue and Sell Securities.

State Corporation Department

Received October 22, 1938.

Los Angeles Office.

No. LA 1865.

To The Honorable Commissioner of Corporations of the State of California:

The application of Pacific Brick Company respectfully represents:

I

That on or about the 11th day of October, 1938, the Honorable Commissioner of Corporations issued to the Pacific Brick Company his permit authorizing said company to sell and issue to any or all of the persons named in its application filed June 9, 1937, an aggregate of not to exceed ten thousand (10,000) of its common shares upon the terms and [622] conditions therein provided.

II

That the Investment Finance Company is not named in the application filed on or about June 9, 1937, as a person or corporation to which applicant proposed to sell its shares; that applicant now desires to sell its shares to Investment Finance Company upon the same terms and conditions that it is authorized to sell its shares

to the persons named in the application of June 9, 1937.

Wherefore, applicant prays that the Honorable Commissioner of Corporations make his order amending his permit of October 11, 1938, so as to authorize applicant to sell its shares to the Investment Finance Company, as well as to the persons named in its application filed June 9, 1937, on the same terms and conditions as authorized in the permit dated October 11, 1938.

Respectfully submitted,

(Signed) PACIFIC BRICK
COMPANY,

a corporation,

By J. HOWARD EDGERTON,

Vice-President

By J. W. SEWARD,

Assistant Secretary.

State of California,

County of Los Angeles—ss.

J. Howard Edgerton and Joseph W. Seward, being by me first duly sworn, depose and say: That they are Vice-President and Assistant Secretary, respectively, of the above entitled corporation; that they have read the foregoing Application for Amendment to Permit to Issue and Sell Securities and [623] know the contents

thereof; and that the same is true of their own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that they believe it to be true.

(Signed) J. HOWARD EDGERTON
JOSEPH W. SEWARD.

Subscribed and sworn to before me, this 19th day of October, 1938.

(Signed) MILDRED HAR-
GRAVES

Notary Public, in and for the County of Los Angeles, State of California.

My Commission expires August 20, 1942.' " [624]

"Mr. Campbell: At this time I wish to renew my offer of plaintiff's Exhibit 12, which is the application for permit to issue stock of the R. F. D. Discount Company, a corporation.

The Court: That was the company whose records have been mislaid?

Mr. Campbell: Yes, your Honor.

The Court: It may be admitted, the objection already having been made, and may be considered to be renewed at this time, and overruled, subject to a motion to strike, and exception allowed.

Mr. Irwin: In addition to the objections that were made at the time of the first offer, may it be understood that the objections that

were made to Exhibit 10 a few minutes ago may be considered to apply to this also?

The Court: The same objections may be deemed to be made, and the same ruling as to all defendants.

Mr. Adams: Your Honor, I don't know whether that includes the objection of no foundation as relating to the defendant Twombly or not.

The Court: Yes, it does.

Mr. Campbell: I make the same offer with regard to plaintiff's Exhibits 13 and 14.

The Court: The same ruling, the same objections, same exception. It will be admitted and marked in regular order.

Mr. Campbell: Thirteen is a supplement to the application of the R. F. D. Discount Company, and 14 is an application for amendment to permit for issuance of stock of that company."

(Thereupon said documents were received in evidence and marked respectively 12, 13, and 14.)

"Mr. Campbell: Now, I will read these three documents [625] at this time.

Plaintiff's Exhibit No. 12—I will state first that this document is dated, or bears the reception stamp of March 3, 1934:

'BEFORE THE DIVISION OF COR-
PORATIONS, DEPARTMENT OF IN-
VESTMENTS, STATE OF
CALIFORNIA.

In the Matter of

R. F. D. DISCOUNT COMPANY,
a corporation,
Applicant.

Application for Permit to Issue Stock.

State Corporation Department,

Received March 3, 1934.

Los Angeles Office.

58588 LA. LA 9827.

Comes now the above named Applicant, and respectfully represented and petitions the Honorable Commissioner of Corporations of the State of California, as follows:

I.

That the Articles of Incorporation were duly and regularly filed with the Secretary of State on the 7th day of February, 1934.

II.

The names, residences and post-office addresses of its officers are as follows:

Name.	Office.	Address.
H. B. Colwell,	President,	2103 Virginia Road, Los Angeles, Calif.
M. H. Bauer,	Vice-President,	1157 East Broadway, Long Beach, Calif.
M. E. Dickman,	Secretary-Treasurer,	145 Douglas Street, Los Angeles, Calif.

[626]

III.

The location of its principal office for the transaction of business in the County of Los Angeles, State of California, is: 1017 Rowan Building, 458 South Spring Street, Los Angeles, California.

IV.

There are no assets and liabilities of the company at the present time, with the exception of the expense of incorporation, including expense for filing Articles of Incorporation and paying necessary license fees, in the sum of \$58.30.

V.

The corporation does not plan to do an active business of any kind, being organized by a group of ten individuals for the purpose of holding their shares of stock in other groups. The company will probably invest in shares of stock of other corporations from time to time, merely as an investment for its shareholders, or it may purchase real-estate or deeds of trust as an investment for its own shareholders. In

the event that such purchases are made, they will be made in the beginning from cash invested in the company by the shareholders, and future investments will be based entirely upon profits made on the company's own investments.

A copy of the Preorganization Agreement described above and entered into by and between the prospective shareholders herein, is attached hereto, made a part hereof, and marked Exhibit "A".

VI.

The shares of common stock of the company [627] shall be issued in form substantially as the form attached hereto and marked Exhibit "B".

VII.

A copy of the Articles of Incorporation of the applicant is attached hereto, made a part hereof and marked Exhibit "C".

VIII.

The applicant proposes to issue its shares of stock immediately upon receiving the necessary permission from the Commissioner of Corporations

IX.

The applicant proposes to issue 75,000 shares of its common stock, said stock to be issued only to the following named in-

dividuals: R. W. Starr, J. L. Smale, E. C. Thomas, A. R. Ireland, William Leffert, A. L. Johnson, W. S. Brayton, F. A. Anderson, C. E. Berry and J. Howard Edger-ton, and none of said individuals are to purchase from the corporation in excess of \$7500.00 worth of said stock, the par value of which shall be One Dollar (\$1.00).

The stock shall be issued for the following considerations:

- (a) For cash;
- (b) For the par value of any shares of guarantee capital stock of The Railway Mutual Building and Loan Association, a corporation, that shall be turned in and exchanged for shares of stock in this corporation by any of the above named ten individuals;
- (c) For the par value of any shares of common or preferred stock of the First Security Deposit [628] Corporation, a corporation, that shall be turned in and exchanged for stock of this corporation by any of the above named individuals;
- (d) For the par value of any bonds issued by the First Security Deposit Corporation, a corporation, and turned in and exchanged by any of the above named individuals for stock of this corporation;
- (4) For services rendered by any one of the above named individuals to the applicant corporation, the amount of shares

to be awarded for said services rendered to be determined by the Board of Directors of this corporation from time to time.

X.

There shall be no public offering of shares of stock in this corporation for sale, and no stock shall be sold by this corporation to any individual other than the above named ten persons; provided, however, that other persons may be named on the shares of stock in joint tenancy with any one of the above named ten individuals.

XI.

There shall be no commission or compensation paid for the sale of the shares of stock above mentioned to any one.

XII.

This application is filed in accordance with the resolution of the Board of Directors of the company at a meeting held at the principal office of the company on the 12th day of February, 1934, at the hour of five o'clock P. M., a true copy of said resolution being attached hereto, made a part hereof, and marked Exhibit "D".

[629]

XIII.

A true copy of the By-Laws of this corporation is attached hereto, made a part hereof and marked Exhibit "E".

XIV.

The present officers of this corporation are acting in their capacity on behalf of the prospective shareholders of the corporation, and will conduct the business of the corporation. In view of the fact that no active business is contemplated, the officers have not been chosen because of any particular qualifications for any line of endeavor. In further view of the fact that there is no immediate business enterprise before the company, no particular working capital is necessary. There have been no investments made to date in other companies, and a schedule thereof cannot, therefore, be shown at this time.

XV.

The reason for the issuance of shares of stock of the corporation to the ten individuals named herein, for a consideration other than cash, is because of the desire on the part of said individuals to pool their various investments and resources in one joint fund, and make real-estate investments, and investments in securities of other companies. It is also because of the desire of the said ten individuals to pool the present voting strength of the shares of stock held by them in The Railway Mutual Building and Loan Association, a corporation, and in the First Security Deposit

Corporation, a corporation. Said ten [630] individuals are close personal friends and business acquaintances of many years standing.

The present acting officers of the corporation are acting in such capacities at no fixed salaries, and with no promised remuneration of the company.

Wherefore, your applicant respectfully requests the Honorable Commissioner of Corporations of the State of California to issue his permit in accordance with the foregoing application.

(Signed) PAUL NOURSE and
J. HOWARD EDGERTON
By J. HOWARD EDGERTON

State of California,
County of Los Angeles—ss.

M. E. Dickman, being first duly sworn, deposes and says: That she is secretary of R. F. D. Discount Company, a corporation, the applicant in the foregoing Application, and makes this verification on behalf of said corporation; that she has read the foregoing Application and knows the contents thereof; that the same is true of her own knowledge, except where therein stated on information or belief, and that as to those matters she believes it to be true.

(Signed) M. E. DICKMAN.

Subscribed and sworn to before me on
this 1st day of March, 1934.

(Signed) ANN MARQUIS,
Notary Public in and for the County of
Los Angeles, State of California.'

Attached thereto is a pre-organization agree-
ment as follows: [631]

PREORGANIZATION AGREEMENT.

This Agreement, made at Los Angeles,
California, this 26th day of January, 1934,
between the following parties: R. W. Starr,
J. L. Smale, E. C. Thomas, A. R. Ireland,
Wm. Leffert, A. L. Johnson, W. S. Bray-
ton, F. A. Anderson, C. E. Berry and J.
Howard Edgerton,

WITNESSETH:

That Whereas, the parties hereto are
now stockholders and/or bondholders in
The Railway Mutual Building and Loan
Association, a corporation, and the First
Security Deposit Corporation, a corpora-
tion; and

Whereas, the parties hereto are desirous
of organizing a corporation, and converting
their stock and bond investment in the two
above named corporations into common
stock in the new corporation,

Now, Therefore, It Is Hereby Mutually
Covenanted and Agreed by and between the
parties hereto, as follows:

I.

A corporation shall forthwith be formed at the expense of all of the above-named individuals under the laws of the State of California, and authorized to issue 75,000 shares of the par value of \$1.00 each, to be known as: R. F. D. Discount Company, and having as one of its objects the acquisition and management of all shares of stock and bonds held by the above-named individuals in the First Security Deposit Corporation, a corporation and/or The Railway Mutual Building & Loan Association, a corporation. [632]

II.

Subject to the provisions of this agreement, the Articles of Incorporation shall be in such form and contain such provisions as may be advised by J. Howard Edgerton, attorney for the parties hereto.

III.

None of the shares of the corporation shall be offered for public subscription.

IV.

Each of the parties hereto shall subscribe for 7500 shares of the corporation, the issuance of which shall be subject to such permit therefor as the corporation may obtain from the Corporation Commissioner of the State of California.

V.

The corporation shall petition the said Commissioner of Corporations for a permit authorizing the corporation to issue shares to each of the above named individuals, up to the amount of \$7500.00, said shares to be paid for either in cash or exchanged for guarantee capital stock of The Railway Mutual Building and Loan Association, a corporation, or common or preferred stock of the First Security Deposit Corporation, a corporation. In the event that the shares are issued in exchange for the stock or bonds above mentioned, the above named individuals shall be entitled to shares of stock in the new corporation, issued in direct proportion to the par value of their shares of stock or bonds in the other two corporations above mentioned. Provided, however, that common stock in the new corporation shall be issued to the above named individuals [633] in return only for stock or bonds owned by them at the time of the execution of this agreement.

VI.

The parties hereto agree that the first directors of the new corporation shall be: M. E. Dickman, H. B. Colwell and M. H. Bauer, and that such directors shall not be entitled to any remuneration for their services.

VII.

After the original issue of common stock to the above named individuals, in return for money or stock and bonds above referred to, the corporation shall then have the power through its Board of Directors to issue stock to the above named individuals for services rendered to the corporation. The amount of stock to be issued in return for said services shall be entirely within the discretion of the Board of Directors of the corporation.

In Witness Whereof the parties hereto have hereunto set their hands this 26th day of January, 1934.

(Signed) R. W. STARR

W. SEWARD BRAYTON

ED C. THOMAS

A. L. JOHNSON

J. L. SMALE

F. A. ANDERSON

C. E. BERRY

A. R. IRELAND

WM. LEFFERT

J. HOWARD EDGERTON.'

[634]

Attached hereto is Exhibit 'D' as follows:

'Whereas, this corporation is authorized in its Articles of Incorporation to issue 75,000 shares of common stock, to be issued and sold at and for the price of \$1.00 per share; and

Whereas, a pre-organization agreement was entered into by and between R. W. Starr, J. L. Smale, E. C. Thomas, A. R. Ireland, Wm. Leffert, A. L. Johnson, W. S. Brayton, F. A. Anderson, C. E. Berry and J. H. Edgerton wherein it was agreed by and between said parties that the corporation when organized should petition the Commissioner of Corporations for a permit authorizing the corporation to issue shares to the above named individuals up to the amount of \$7,500.00 each, said shares to be paid for either in cash or exchanged at par value for guarantee capital stock of The Railway Mutual Building and Loan Association, or at the par value of common or preferred stock, either A or B, of the First Security Deposit Corporation, a corporation, or at the par value of bonds of said First Security Deposit Corporation, or in return for services rendered by the above named individuals to the corporation in an amount to be determined by the Board of Directors of the Company.

Now, Therefore, Be It Resolved: That the secretary of this corporation be and she is hereby authorized and directed to prepare or cause to be prepared, verified and filed, or caused to be filed on behalf of the corporation, an application to the California Commissioner of Corporations for a permit authorizing this corporation to issue

and [635] sell 75,000 shares of its common stock of the par value of \$1.00, at and for the price of \$1.00 per share, to the following named individuals, in an amount not to exceed \$7500.00 in shares to each: R. W. Starr, J. L. Smale, E. C. Thomas, A. R. Ireland, Wm. Leffert, A. L. Johnson, W. S. Brayton, F. A. Anderson, C. E. Berry. and J. Howard Edgerton.'

Also attached hereto is a copy of the By-Laws of the R. F. D. Discount Company, a corporation.

Reading now from plaintiff's Exhibit 13,

'Before the Division of Corporations, Department of Investments, State of California.

In the Matter of R. F. D. Discount Company, a corporation, Applicant.

Supplement to Application for Permit to Issue Stock.'

It bears the stamp 'Received March 22, 1934, State Corporation Department, Los Angeles Office.'

'Comes now the above named Applicant, and respectfully represents and petitions the Honorable Commissioner of Corporations of the State of California, as follows:

I.

That the Applicant desires to issue stock to the following named individuals, in the

following amounts, and for the following consideration:

Name: W. S. Brayton; number of shares to be issued, 7500; for the following: 780 for 39 shares Class B preferred stock of First Security Deposit Corporation; 6720 for 1344 shares common stock of said corporation.

Name: R. W. Starr; number of shares to be issued, [636] 7500; for the following: 40 for 2 shares Class A preferred stock of First Security Deposit Corporation; 2060 for 103 shares Class B preferred stock of said corporation; 5400 for 1080 shares common stock of said corporation.

Name: A. L. Johnson; number of shares to be issued, 7500; for the following: 682 for Collateral trust bonds of First Security Deposit Corporation; 160 for 8 shares Class A preferred stock of said corporation; 1120 for 26 shares Class B preferred stock of said corporation; 1580 for 316 shares common stock of said corporation; 3958 for cash.

Name: A. R. Ireland; number of shares to be issued, 7500; for the following: 2671 for Collateral trust bonds of First Security Deposit Corporation; 217 for Collateral trust notes of said corporation; 200 for 10 shares Class A preferred stock of said corporation; 3440 for 172 shares Class B preferred stock of said corporation; 860 for

172 shares common stock of said corporation; 112 for cash.

Name: Wm. Leffert; number of shares to be issued, 7500; for the following: 1122 for Collateral trust bonds of First Security Deposit Corporation; 320 for 16 shares Class A preferred stock of said corporation; 2240 for 112 shares Class B preferred stock of said corporation; 580 for 48 shares common stock of said corporation; 3238 for cash.

Name: J. L. Smale; number of shares to be issued, 7500; for the following: 63 for Collateral trust bonds of First Security Deposit Corporation; 1200 for 60 shares Class A preferred stock of said corporation; 1300 for 260 shares common stock of said [637] corporation; 4937 for cash.

Name: J. Howard Edgerton; number of shares to be issued, 7500; for the following: 131 for Collateral trust bonds of First Security Deposit Corporation; 20 for 1 share *Class preferred* stock of said corporation; 520 for Services rendered to this corporation as granted by its Board of Directors; 6829 for cash.

Name. E. C. Thomas; number of shares to be issued, 7500; for the following: 20 for 4 shares common stock of *First Deposit* Corporation; 140 for 7 shares Class A preferred stock of said corporation; 180 for

9 shares Class B preferred stock of said corporation; 7160 for cash.

Name: C. E. Berry; number of shares to be issued, 7500; for the following: 320 for 16 shares Class B preferred stock of First Security Deposit Corporation; 7180 for cash.

Name: F. A. Anderson; number of shares to be issued, 7500; for the following: 670 for Collateral trust bonds of First Security Deposit Corporation; 6810 for cash; 20 for 1 share Class A preferred stock of said corporation.

II.

That wherever bonds of the First Security Deposit Corporation are mentioned in the above paragraph as consideration for shares of stock to be issued by this corporation, it is meant that shares shall be issued in return for bonds of an equivalent face value.

III.

That at a special meeting of the Board of [638] Directors of the applicant corporation, held at the principal office of the company, at 5:00 o'clock P. M. on the 16th day of March, 1934, a resolution was duly passed whereby the Board of Directors determined the fair value to the corporation in monetary terms of the various types of consideration to be received for its own

shares of stock. A true copy of said resolution is attached hereto, made a part hereof, and marked Exhibit "A".

IV.

That the form to be used for the shares of common stock to be issued by the applicant corporation heretofore filed with the original application herein shall have written somewhere on the face of said certificate the following words:

"All shares of stock issued by this corporation are subject to the restrictions upon transfer as set forth in the Articles of Incorporation."

Wherefore, your Applicant respectfully requests the Honorable Commissioner of Corporations of the State of California, to issue his permit in accordance with the foregoing application and this Supplement thereto.

(Signed) R. F. D. DISCOUNT COMPANY, a corporation,
 By M. E. DICKMAN, Secretary.
PAUL NOURSE and
J. HOWARD EDGERTON,
By J. Howard Edgerton
Attorneys for Applicant.'

Sworn to before Ann Marquis, Notary Public, on the 21st day of March, 1934,
by M. E. Dickman. [639]

Attached as Exhibit A, the following resolution:

'Resolved, That Whereas, it is to the best interests of this corporation to receive and hold bonds, preferred stock and common stock, of the First Security Deposit Corporation, in whatever quantities the same can be obtained, and,

Whereas, the organizing stockholders of this corporation have requested this Board of Directors to issue stock in return for various types of consideration,—

Now, Therefore, Be It Resolved: That the following types of consideration shall have the following monetary value:

All collateral trust bonds and notes of the First Security Deposit Company shall have a value to this company in the face amount of that indicated upon said bonds or notes. In other words, they shall be worth par to this corporation.

All preferred stock, both Class A and Class B, of the First Security Deposit Corporation, shall be valued by this company at the sum of \$20.00 per share, which is the par value of said stock.

All common stock of the First Security Deposit Corporation shall be valued at the sum of \$5.00 per share.

Be It Further Resolved, that the Secretary of this company be instructed to file a supplement to the Application heretofore

filed with the Commissioner of Corporations, requesting a permit to issue stock to the following persons, in the following amounts, and for the following considerations:

Then follows the same names and amounts as set forth in the body of the document.” [640]

“Mr. Campbell: At this time I will read plaintiff’s Exhibit No. 14:

Before the Department of Investment, Division of Corporations—State of California.

File No. 58588 LA

In the Matter of

R. F. D. DISCOUNT COMPANY, a corporation,

Applicant.

APPLICATION FOR AMENDMENT
TO PERMIT FOR ISSUANCE OF
STOCK.

State Corporation Department. Received September 21, 1934. Los Angeles Office. LA 11911.

Comes now the applicant company and respectfully represents to the Commissioner of Corporations as follows:

I.

That on the 23rd day of March, 1934, a permit was granted by the Honorable Com-

missioner of corporations to the applicant company, authorizing it to sell and issue its securities in accordance with its Application and Supplemental Application heretofore filed.

II.

That on the 3rd day of May, 1934, the applicant company issued its stock to an escrow holder theretofore appointed by the Corporation Commissioner in the names of the respective parties named in the permit, together with other persons as joint tenants; that the stock issued to said other persons as joint tenants was in error and not in accordance with the permit on file herein, and on the 19th day of September the corporation cancelled all stock issued to [641] other persons as joint tenants in violation of the permit, and instructed the secretary to issue new shares of stock to those persons authorized by permission of the Corporation Commissioner herein.

That about said date an audit was made of the corporation books, and the applicant company ascertained that certain stockholders of the corporation had turned in stock belonging to other stockholders, and vice versa in consideration of the shares of the R. F. D. Discount Company, and that it would be necessary for an amendment to the permit to issue stock to be obtained in order to rectify said error.

III.

That at a special meeting of the Board of Directors of applicant corporation held at the principal office of the company at five o'clock P. M. on the 7th day of September, 1934, a resolution was duly passed, whereby the Board of Directors authorized the secretary of the applicant company to file an application for an amendment to the stock permit authorizing the applicant company to issue stock certificates in accordance with the within application. A copy of said resolution is attached hereto, made a part hereof and marked Exhibit "A".

Wherefore, your applicant respectfully requests the Honorable Commissioner of Corporations to make his order authorizing the applicant company to issue shares of its stock to the following [642] persons, for the following consideration:

Name	Shares	Consideration
A. L. Johnson	1120	56 shares of Class B. preferred stock of First Security Deposit Corporation.
Wm. Leffert	320	64 shares of common stock of said First Security Deposit Corporation.
J. L. Smale	1120	56 shares of Class B preferred stock of First Security Deposit Corporation.

R. W. Starr 920 46 shares of Class A preferred stock of First Security Deposit Corporation.

R. F. D. DISCOUNT COMPANY,
a corporation.

By H. B. COLWELL (Signed)
Secretary

PAUL NOURSE and
J. HOWARD EDGERTON,
(Signed) By J. HOWARD EDGERTON,
Attorneys for Applicant.

State of California,
County of Los Angeles—ss.

H. B. Colwell, being first duly sworn, deposes and says: That he is secretary of R. F. D. Discount Company, a corporation, applicant herein, and makes this verification on behalf of applicant; that he has read the foregoing Application and knows the contents thereof; that the same is true of his own knowledge, except where therein stated on information or belief, and that as to those matters he believes it to be true.

(Signed) H. B. COLWELL.

Subscribed and Sworn to before me on this 20th day of September, 1934.

(Signed) ANN MARQUIS.

Notary Public in and for the County of Los Angeles, State of California.

[Seal] [643]

Mr. Campbell: At this time I wish to renew my offer as to plaintiff's Exhibit 16, which is a document entitled 'In the Matter of American Building and Investment Company, Application for Permit to Issue and Sell Shares,' bearing the signature of J. Howard Edgerton, and Bundy Colwell.

Mr. Irwin: Might it be understood, your Honor, the same objections as were made to the introduction of Exhibit 10 may be deemed to have been reiterated as to this Exhibit.

The Court: Will you approach the bench in connection with it.

(The following proceedings were had outside the presence of the jury.)

"The Court: So far as this company is concerned can't you enter into an oral stipulation that covers it without putting in all of this.

Mr. Campbell: The situation was simply this, if we can stipulate, that this company had an authorized capitalization and there were issued and outstanding 25,000 shares; and on the date set forth in that document, the Investment Finance Company acquired 17,000 of such shares at the price paid.

Mr. Irwin: I would have no objection to stipulating that that is the fact, but I would interpose the objection of its being immaterial * * * that is a little different situation than some of these others. There are no defendants

individually who have had any stock in that company. I believe that is correct.

Mr. Campbell: There is no personal interest here. * * * The company was organized as set forth in the application, stating that 'Money derived from the sale of stock will be invested in real estate loans, business investments of a general nature and in financing a general insurance agency.' [644]

Mr. Irwin: As I said before, I feel that there being no stock interest held by any one of the defendants, that any evidence as to that company, is objected to on the ground that it is immaterial, and likewise, it is hearsay, but I am not making any point if your Honor overrules the objections. I stipulate that that is what the situation is. I don't feel that that comes within the ruling that the Court has made.

The Court: Well, now, it seems to me they are entitled to show that the Investment Finance Company invested in this company. The name doesn't disclose what its purposes were. Its articles or its application does; and if it can be stipulated, I will permit, at least, that part of it from the articles, or from the application for permit, which indicates what the business of the company was.

The amount of the investment is material. Beyond that I am not interested, and there being no showing that the directors here were involved in it, it is simply under the one matter

alleged in the indictment, namely, that this corporation invested in other than securities which were indicated in its representation.

* * * * *

Mr. Campbell: Are all parties willing to stipulate?

Mr. Irwin: Yes, your Honor, may it be understood that we are stipulating but we aren't waiving our objection to that whole line of testimony?

The Court: Certainly not.

Mr. Lawson: As I understand your Honor, it is limited to that part of the indictment that says that they represented that the investments would be legal investments.

The Court: That is the reason it is being permitted to go in evidence. [645]

Mr. Irwin: It is stipulated that those are the facts, over the objection, and a ruling that it is overruled, and exception.

* * * * *

Mr. Campbell: I will state what the books of the Investment Finance Company show as to dates, amount of shares acquired, and the price paid, what the books show as to loans and receipts on repayments as to Bond 17. (Bond 17—Dog Food Company.)

The Court: It is stipulated that they were in the business of making dog and cat food.

Mr. Campbell: If we can stipulate to that—you don't want to stipulate as to their financial structure?

The Court: I don't think that makes any difference.

Mr. Irwin: I think that is immaterial under that theory.

Mr. Lawson: As I understand it, it is limited to the point that your Honor stated, the type of investment that was made, which is at variance with the type as represented.

Mr. Campbell: On Bond 17 I will confine myself to the books of the Investment Finance Company.

Mr. Irwin: That stipulation is understood again over exception to the objection of materiality; overruled; and exception, subject to a motion to strike?

The Court: That is right.

Mr. Lawson: That is true as to all defendants.

The Court: Yes."

A similar stipulation was entered into with respect to Pacific Brick and that the books and records of the Pacific Brick Company showed certain issues of shares of stock to certain persons, all subject to the same objections as stated with respect to the American Building and Investment Company, Bond—17 Dog Food Company, and exceptions.

[646]

(The following proceedings were had in the presence of the Jury.)

"Mr. Campbell: I will state each one separately then, if I may.

It is stipulated that on August 12, 1938 the Investment Finance Company subscribed for and bought 17,000 shares of the 25,000 shares originally issued of the American Building and Investment Company, paying therefor the consideration of \$17,000.

With reference to the American Building and Investment Company, it will be further stipulated that, as reflected in its application for permit to issue shares, which application was made to the State Corporation Commission, that the principal business of such corporation is the investment in real estate loans, business investments of a general nature, and in the financing of a general insurance agency.

The Court: May it be so stipulated?"

(To which all Counsel answered "So Stipulated".)

"Mr. Campbell: It will be further stipulated that, with reference to the Pacific Brick Company, that the books and records of the Pacific Brick Company show that on the 20th day of August 1937 Certificate No. 6 was issued to E. C. Thomas in the amount of 500 shares, Certificate No. 7 to R. W. Starr, in the amount of 1,410 shares; and Certificate No. 8, to R. W. Starr, in the same amount; and, further, that as of said date there were outstanding of such company 10,000 shares of capital stock."

(To which all Counsel answered "So Stipulated".)

"Mr. Lawson: Pardon me for interrupting, Mr. Campbell.

Your Honor, don't you think it would be appropriate at this time for counsel to state the purpose of the stipulation, its applicability, in other words? [647]

The Court: Well, the reason which I have announced, gentlemen of the jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in effect, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the plaintiff's case in connection with that allegation of the indictment.

Mr. Campbell: Now first I will ask, it will be stipulated that the Bond 17 Dog Food Company is a company engaged in the manufacture and sale of pet food, is that correct?

Mr. Irwin: It is now and at the outset was intended as such a company. I think that should be stated. That was the purpose of its incorporation.

Mr. Campbell: Yes. I will so amend my statement.

May it be stipulated to?

The Court: May it be so stipulated, gentlemen?"

(To which all Counsel answered "So Stipulated".)

"Mr. Campbell: I will read first the date of acquisition, the number of shares, and the consideration paid:

'February 1, 1938, 7,000 shares, \$7,000.

April 5, 1938, 1,000 shares, price paid, \$1,000.

April 8, 1938, 2,500 shares, price paid, \$2,500.

April 16, 1938, 1,000 shares, price paid, \$1,000.

April 22, 1938, 5,000 shares, price paid, \$5,000.

May 3, 1938, 400 shares, price paid, \$400.

May 10, 1938, 435 shares, price paid, \$435.

May 12, 1938, 2,000 shares, price paid, \$2,000.

May 27, 1938, 100 shares, price paid, \$100.

August 2, 1938, 13,000 shares, price paid, \$6,500.

August 24, 1938, 8,000 shares, price paid, \$4,000.

August 25, 1938, 8,000 shares, price paid, \$4,000. [648]

August 26, 1938, 8,000 shares, price paid, \$4,000.

August 26, 1938, 2,000 shares, price paid, \$1,000.

August 29, 1938, 6,000 shares, price paid, \$3,000.

August 29, 1938, second acquisition, 4,000 shares, price paid, \$2,000.

August 31, 1938, 6,341 shares, price paid, \$1,000.

January 24, 1938, 14,266 shares, price paid, \$891.17.

Total shares, 89,042, total price paid, \$45,826.17.

The books reflect the following loans to and repayment from the Bond 17 Dog Food Company:

May 10, 1938, loaned \$565.

May 20, 1938, loaned \$1,000.

May 23, 1938, loaned \$500.

May 24, 1938, loaned \$1,000.

May 24, 1938, loaned \$500.

May 27, 1938, loaned \$1,000.

May 31, 1938, loaned \$1,000.

June 2, 1938, loaned \$4,000.

June 15, 1938, loaned \$6,000.

July 8, 1938, repaid \$2,000.

July 4, 1938, loaned \$2,000.

July 5, 1938, loaned \$2,000.

July 21, 1938, loaned \$435.

July 26, 1938, loaned \$1,000.

August 25, 1938, repaid \$4,000.

August 26, 1938, repaid \$4,000.

August 26, 1938, credit of \$1,000 by adjustment.

August 29, 1938, repaid \$4,000.

August 30, 1938, repaid \$5,000.
August 31, 1938, repaid \$1,000.
September 26, 1938, loaned \$2,000.
September 29, 1938, repaid \$1,000.
October 4, 1938, loaned \$1,000. [649]

The following items are all loans so I will not repeat the statement each time:

October 7, 1938, \$1,000.
October 14, 1938, \$1,000.
October 24, 1938, \$500.
October 28, 1938, \$500.
November 1, 1938, \$1,000.
November 9, 1938, \$1,000.
November 9, 1938, \$500.
November 15, 1938, \$500.
November 17, 1938, \$500.
November 19, 1938, \$500.
November 22, 1938, \$500.
November 29, 1938, \$2,000.
December 8, 1938, \$2,000.
December 23, 1938, \$500.
December 27, 1938, \$1,000.
January 4, 1939, \$1,000.
January 14, 1939, \$1,500.
January 19, 1939, \$2,000.
January 24, 1939, \$200.
January 25, 1939, \$6,000.
February 1, 1939, \$1,000.
February 3, 1939, \$1,000.
February 8, 1939, \$1,000.
February 17, 1939, \$2,000.

March 1, 1939, \$1,000.
March 11, 1939, \$2,000.
March 18, 1939, \$1,000.
March 27, 1939, \$1,000.
April 4, 1939, \$1,000.
April 6, 1939, \$1,000. [650]
April 12, 1939, \$2,000.
April 14, 1939, \$1,100.
April 24, 1939, \$1,000.

Total loans, \$63,800, repayments, \$22,000, balance, \$41,800 transferred to notes receivable.

The following are notes receivable commencing with the first item, which said amount was transferred from open account into a notes receivable as of May 1, 1939, \$41,800.

May 2, 1939, \$1,000.
May 12, 1939, \$1,000.
May 18, 1939, \$2,000.
May 25, 1939, \$1,000.
June 5, 1939, \$2,000.
June 19, 1939, \$1,000.
June 22, 1939, \$1,000.
July 10, 1939, \$1,000.
August 30, 1939, \$2,000.
October 14, 1939, \$1,500.
October 20, 1939, \$1,000.
November 6, 1939, \$2,500.
January 15, 1940, \$1,000.
January 31, 1940, \$500.
February 15, 1940, \$500.
March 6, 1940, \$1,100.

March 12, 1940, \$500.
April 8, 1940, \$500.
April 19, 1940, \$1,000.
June 26, 1940, \$500.
July 9, 1940, \$500.
August 8, 1940, \$250.

Total notes receivable, \$65,150, repayments not shown. Now might it be stipulated, pursuant to our statement [651] here at the bench, that subject to correction, those are the items set forth upon the books of the Investment Finance Company?

Mr. Irwin: As of the dates given.

Mr. Campbell: As of the dates given.

The Court: May it be so stipulated?"'

(To which all Counsel answered, "So Stipulated".)

Mr. Campbell: May it be further stipulated that the books and records of the Investment Finance Company disclose that as of the 28th day of July, 1938, Investment Finance Company acquired 16,106 shares of the Pacific Brick Company, for which said shares a consideration of \$13,313.49 was paid; that as of August 5, 1938, it acquired 5,000 shares, for which consideration of \$5,000 was paid, making a total number of shares 21,106, amount paid for it \$18,313.49.

Mr. Irwin: I may have missed it, if counsel will give me the first figure and state what that was with reference to the total outstanding.

Mr. Campbell: As of August 5, 1938, there were outstanding 45,000 shares of capital stock of the Pacific Brick Company.

Now, I wonder, with that addendum, if the present stipulation may be accepted. Then I will proceed.

The Court: Is that satisfactory?

Mr. Lawson: Yes.

Mr. Irwin: Yes.

Mr. Butler: Yes.

Mr. Adams: Yes.

The Court: It is so stipulated. Proceed."

(To which all Counsel answered, "So Stipulated.")

"Mr. Campbell: The plaintiff will further stipulate the records of the Bond 17 Dog Food Company, and the American [652] Building and Investment Company do not disclose stock ownership at any time on the part of any of these defendants.

Mr. Lawson: I object to the word 'disclose' in connection with that. I think the stipulation is broader, that there is no evidence. It is stipulated they had no interest. That is the effect of it.

The Court: It may be that they did, but that is all the plaintiff can stipulate to. You stipulate that that is what the records show. The records don't disclose any interest.

Presumably they haven't any, and they haven't any unless the plaintiff proves they have. But so far as the stipulation is con-

cerned, the wording is all right, and the jury are to consider, unless the plaintiff proves they had some, that they didn't have any. * * *

The Court: The records don't show that they have any. I think the wording is correct.

Mr. Campbell: I stated that the Government will stipulate that the records of the Bond 17 Dog Food Company, and of the American Building and Investment Company do not disclose any stock ownership at any time on the part of any of these defendants.

Mr. Irwin: Acceptable, your Honor.

The Court: It may be so stipulated, then.

Mr. Irwin: Might we make the same query except as to the other defendants than the Pacific Brick? In other words, as your Honor will recall, there were certain other unnamed defendants. Might we have the same declarations?

The Court: May it be stipulated that other than as disclosed by reading from the records, that the records do not disclose any stock interest in the Pacific Brick other than as previously indicated?

Mr. Campbell: Yes, your Honor. I so stipulate.' [653]

(Thereupon the following plaintiff's Exhibits were read to the Jury.)

"Plaintiff's Exhibit 153, being a letter on the letterhead of the American National Bank of St. Joseph, Missouri, dated July 19, 1938.

This letter is addressed to the

'First Security Deposit Corporation,
415 S. La Brea Avenue,
Los Angeles, Calif.

Gentlemen:

One of our customers holds one of your Cumulative Collateral Trust Bonds, Series A, No. A-6721 for \$854.20 and Certificate A 934 for 11 shares of your Class "A" Preferred stock. She has been informed that the corporation is in process of liquidation and has had an offer for the securities.

Will you please advise us if your corporation is liquidating, and if so, should the bond and certificate be sent in, or disposed of in any way. If she should sell the securities on the market at the present time, can you tell us about what she should receive for them.

Yours very truly,

GEORGE E. RICHMOND,
Vice President.'

The next one, being plaintiff's Exhibit No. 155, on the letter head of the First Security Deposit Corporation, dated August 3, 1938.

'Mr. George U. Richmond
Vice President
American National Bank
St. Joseph, Missouri

Dear Sir:

Re your letter of July 19th, 1938, concerning our securities.

This corporation is conducting a process of liquidation in as orderly a manner as is possible; the bulk of its assets consisting of trust deeds acquired during the inflationary period of the late nineteen twenties, and of real estate acquired through foreclosure of such trust deeds. The present governmentally sponsored lending efforts make competition pretty difficult for this type of assets.

It is the aim of the company to complete its liquidation as expeditiously as possible. As to whether its security holders should retain, or dispose, or their securities, this company has no advice to offer one way or the other, as the final outcome entirely depends upon future economic conditions, and as to these it is certain that no present prognostication will be of any great value.

We understand the market on these securities at the present time to be in the

neighborhood of 75% of the face on the bonds and 10% on the par of the stock.

Yours very truly,

FIRST SECURITY DEPOSIT
CORP.

By C. W. TWOMBLY.'

Plaintiff's Exhibit No. 36, and specifically reading a [655] portion of the minutes of June 24th, the minutes rather, of the special meeting of the Board of Directors of the Investment Finance Company of June 24, 1937.

'The following Directors were present:

Messrs. R. W. Starr

J. H. Edgerton

E. C. Thomas

The following Directors were absent:

Messrs. J. L. Smale

C. W. Twombly.

On motion of Mr. Thomas, seconded by Dr. Starr, a resolution was unanimously passed authorizing and directing Mr. Edgerton to employ Mr. Charles T. Cronk at a salary of \$200.00 per month, plus a reasonable automobile expense for this purpose.'

Now, I should have read the former paragraph. This will be backwards.

"A discussion was had as to the advisability of employing a man for the purpose of contacting outstanding bondholders

of the First Security Deposit Corporation in an effort to ascertain the advisability of liquidating the complete bond issue prior to its maturity in 1942.'

Then the other paragraph that I read. I don't care to read any more of it.

* * * * *

"Mr. Adams: I wish to read from Government's Exhibit No. 36, minutes of regular meeting of the Board of Directors, Investment Finance Company, as of Date August 17, 1938.

'The following Directors were present:

Messrs. R. W. Starr

E. C. Thomas [656]

J. L. Smale

A. R. Ireland

C. W. Twombly.'

I am reading from the fifth paragraph, at the bottom of the first page of those minutes:

'On motion of Mr. Twombly, seconded by Mr. Smale, and carried, Mr. Twombly voting "No," it was resolved that Mr. Cronk's employment be extended upon the same terms and conditions for the period of one month.'

Mr. Lawson: Will it be stipulated that Mr. Twombly signed the minutes and prepared them?

Mr. Adams: Reading from plaintiff's Exhibit 36, as of date September 21, 1938, reading

from the minutes of the regular meeting of the Board of Directors of the Investment Finance Company held on that day.

‘The following Directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.’

I am reading from the paragraph, being the last paragraph on the first page of those minutes.

‘On motion of Mr. Thomas, seconded by Mr. Smale, and carried, Mr. Twombly voting “No,” it was resolved that Mr. Cronk’s employment be extended upon the same terms and conditions for the period of one month.’

Same stipulation, if Mr. Lawson wishes it, that he was present at the meeting; acted as secretary thereof; and signed the minutes as such secretary.” [657]

“Mr. Adams: The next one I wish to read from is October 19th, reading from plaintiff’s Exhibit 36, minutes of the regular meeting of the Board of Directors of the Investment Finance Company, as of date October 19, 1938.

"The following Directors were present:

Messrs. R. W. Starr

C. W. Twombly

A. R. Ireland

E. C. Thomas

J. L. Smale

In addition to the Directors

Mr. J. H. Edgerton, and

Miss Florence Long

were present.'

I am reading from the second from the bottom paragraph on the first page thereof.

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, Mr. Twombly voting "No," it was resolved that Mr. Cronk's employment be extended upon the same terms and conditions to and including November 16, 1938, unless terminated sooner by himself.'

Mr. Twombly was present at that meeting, but the minutes are signed by Florence Long, as secretary.

Mr. Campbell: I wish to read a few more minutes—I am reading from plaintiff's Exhibit 36, meeting of May 25th, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.' [658]

Reading in part:

‘On motion of Mr. Twombly, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk’s employment be extended to June 1, 1938.’

Minutes signed ‘R. W. Starr, Chairman; C. W. Twombly, Secretary.’

Meeting of June 1, 1938.

‘The following directors were present:

Messrs. R. W. Starr
E. C. Thomas
J. L. Smale
A. R. Ireland
C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton and Mr. C. L. Cronk were present.’

Reading in part:

‘On motion of Mr. Smale, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk’s employment be extended for two weeks.’

Minutes signed ‘R. W. Starr, Chairman, C. W. Twombly, Secretary.’

Minutes of June 15, 1938:

‘The following directors were present:

Messrs. R. W. Starr
 E. C. Thomas
 J. L. Smale
 A. R. Ireland
 C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, [659] and carried, Mr. Cronk's employment was extended until the next regular directors' meeting.

On motion of Mr. Ireland, seconded by Mr. Twombly, and carried, it was resolved that Mr. Cronk be paid at the rate of \$75 per month for automobile expense.'

Minutes are signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Minutes of July 20, 1938:

'The following Directors were present:

Messrs. R. W. Starr
 E. C. Thomas
 J. L. Smale
 A. R. Ireland
 C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by

Mr. Smale, and carried, it was resolved that Mr. Cronk's employment be extended for the period of one month.' Signed, 'R. W. Starr, Chairman; C. W. Twombly, Secretary.' ”

(Thereupon the Plaintiff rested its case in chief.) [660]

“Mr. Irwin: May it please the court, on behalf of the defendants Starr, Thomas and Smale, individually, I respectfully move Your Honor to strike all of the evidence heretofore received, which would be from Exhibit 1 to, I believe, it is 218, Your Honor.

On the grounds that no prima facie showing has been laid as to the scheme charged in the indictment with reference to the first fourteen counts.

I respectfully move this Honorable Court, with reference to Count 15, which is the conspiracy count, that overt acts 1 to 41 be stricken on the grounds that no corpus delicti has been laid to show the existence of the conspiracy charged in the indictment; or that if such a conspiracy did exist, the association therewith, with knowledge, and with the intent to further the purpose charged in the indictment, on the part of either defendants, Dr. Starr, Smale or Thomas, has not been shown.

Here is where I am coming to the classes. With reference to the motion to strike on hearsay, I will have to particularize that somewhat, not too much, because here is the way I feel,

that the law will fall on that: With reference to such letters as may have been written, for example, by the defendants Cronk or Twombly, if the court should hold that there was a scheme, and that my clients, with knowledge of that scheme, and the intent to participate, both the knowledge and the intent having to exist at the time the scheme was alleged to have been formed, that then whether they knew about the letters or not, the objection of hearsay would not stand, because they would be responsible for the acts done in furtherance thereof.

I thoroughly recognize that principle. Now, likewise, and there will be another motion with reference to the grounds of hearsay, and that it has not been connected up [661] to those documents which have been introduced, which are signed by third persons, and which have been introduced either on the theory to show intent, or on the theory of showing similar actions or transactions, but where it is not shown it was done by anyone on behalf of, or who was a party to the scheme, then there is a distinction there with reference to the hearsay.

With that preamble, your Honor, I particularly move the Court to strike the indictment letters—Exhibit 161, which refers to Count 1.

I move to strike Exhibit 156, which is Count 2.

Count 3, the Government has indicated that

they moved and will thereafter move to dismiss that count.

Exhibit 158, which is Count 4;
Exhibit 159, which is Count 5;
Exhibit 168, which is Count 6;
Exhibit 151, which is Count 7;
Exhibit 161, which is Count 8;
Exhibit 162, which is Count 9;
Exhibit 155, which is Count 10;
Exhibit 163, which is Count 11;
Exhibit 164, which is Count 12;
Exhibit 165, which is Count 13;
Exhibit 166, which is Count 14.

Your Honor, the motion to strike the exhibits to which I have just particularly referred is based upon the fact that they were admitted over objection of materiality, that the corpus delicti had not been laid, and that they were hearsay as to my clients, the Defendants Starr, Thomas, and Smale, and were admitted with the promise that they would be connected up.

In support of that motion I hope to point out to your [662] Honor that that responsibility has not been fulfilled by the plaintiff in that in addition to the grounds that no scheme has been shown to have existed, as charged in the indictment, that there is in addition thereto, that there is not one iota of testimony to show that either the Defendant Starr, Smale or Thomas, at the time the scheme is alleged to have been performed, had any knowledge of such a scheme, nor did they do any act with

the intent of participating in such scheme, or furthering its accomplishment."

* * * * *

"The Court: As I understand the indictment, it was in the initial stages, after the preliminaries, that prior to the dates upon which the count letters were placed, or caused to be placed in envelopes, with prepaid postage, and so forth, that prior to that time these defendants had devised and intended to devise a scheme to defraud certain persons, and to obtain money or property from them and others, unknown, and to obtain money from investors in the Railway Building and Loan who had theretofore converted their investments into securities of the First Security; and that they had devised, and intended to devise the scheme to obtain this money by means of false and fraudulent promises, and representations, and pretenses; and then it goes on after that to show the way the scheme and artifice was carried on.

Mr. Irwin: Yes, your Honor, I subscribe to that. That is why I asked your Honor to bear in mind 'by means of false and fraudulent pretenses, representations, and promises,' that they were going to defraud these people.

What I am going to take up in a moment, with the Court's permission, is find in the indictment a starting place where [663] the scheme, having been formed, it is alleged that they started doing things in furtherance of the

scheme; in other words, when you do something in furtherance of a matter, you already have the matter itself in mind that you are going to further. That, I believe, is a fair statement.

So that when we come to that point, we then will find within the indictment that the scheme charged is alleged to have been then in existence, and that the matters subsequently done were in pursuance and in furtherance of the scheme,

* * * the indictment, it charges this scheme to defraud and take money and property of the investors was formed the date not later than November 1, 1932; that the scheme was then in existence.

If I am correct on that premise, the law is clear that all the elements of the crime must be present. That includes, your Honor, not only must the scheme charged in the indictment be present, but likewise the defendants who are accused of being party to that scheme must be shown that they had knowledge of the scheme, and that they agreed to, or by their acts, may be said to have agreed and intended to participate in the scheme.

The Court: Just let me see if I understand that. So far, the allegation of the indictment is that prior to the time of the mailing out of any count letter, the earliest count letter was mailed on June 22, 1938.

Now, you say that the allegations of the indictment are such that the scheme or devise to defraud must have been entered into before the

first day of November, 1932, which is the date, as I remember it, that the indictment alleges that the First Security issued its bonds and stocks in exchange for the Railway Building and Loan securities.

Mr. Irwin: That is right, your Honor. [664]

The Court:

Is the gravamen of the offense the issuance of the securities by the Railway Building and Loan, or is the gravamen of the offense the scheme and the execution of the scheme to acquire from divers and certain and sundry persons the securities which had been previously issued? In other words, the date of November 1, 1932 is only of interest to us in that the Government could not put in any evidence of any action so far as the execution of the crime is concerned prior to that date, because the foundation wasn't in existence until that date because the securities weren't issued."

* * * * *

"I disagree with counsel Irwin, and I see no basis in the indictment for the statement that the scheme could not be originated—must have originated not later than November 1st.

I don't think that date is very material. It seems to me that under the indictment the scheme might have originated at almost any date. The time of the origination of that scheme is an indefinite matter, which will have to be determined by the jury from the facts

as they find them. There could have been no execution of that scheme, manifestly, until the securities which formed the basis for the carrying out of the fraud were in existence, and that date is November 1, 1932, as I understand the indictment.

Now, it seems to me that that scheme could have originated at any time, but it couldn't have been carried out actually by any acts on the parts of the conspirators, carried out, until after two things had occurred: One, the securities of the Railway Building and Loan had been issued, and, two, those securities had been converted by the investors from Railway Building and Loan into First [665] Security Deposit Corporation.

Now, I disagree with counsel Irwin on another element. I understand the law to be that the jury is entitled to take all of the items of evidence which are properly introduced by the Government, and admitted by the court, into a count in determining whether or not, as to the substantive offenses, that there was a scheme to defraud by the use of the mails; and, as to the conspiracy count, as to whether or not there was the conspiracy alleged.

I believe that the jury is entitled to determine, from subsequent acts, which are items of circumstantial evidence, what had taken place in their judgment prior to that time".

* * * * *

"Mr. Irwin: * * * I took the top of Page 4,

* * * the allegation ‘that thereafter and for the purpose of, and pursuant to the said scheme and artifice, to defraud the said persons intended to be defrauded, and on or about the 28th day of December, 1936’. All right, there is that date.

Now, sub-section 1: ‘That thereafter and for the purpose of’—

Funk and Wagnall’s dictionary on ‘purpose’—it might seem idle, but so that I can give my thought to your Honor—‘purpose’ is given this definition:

‘An idea or ideal kept before the mind as an end, effort or action.’

And the second choice given to the definition:

‘The particular thing to be affected or attained.’

Now, then, with the word ‘pursuant’. Your Honor is familiar with it, but I have used it idly for many years, but I wanted to get that clearly in my mind so Your Honor would understand what I have before me.

‘Pursuant’ is in accordance with—now, therefore, Your Honor, I submit, with the reading of that allegation, [666] that obviously our scheme, and our artifice to defraud, was prior to December, 1936.

Now, why do I say then that I go back to December, 1932? That would be Your Honor’s question.

* * * * *

Now, what do we have then between November 1, 1932, and this December, 1936?

We have, if Your Honor will follow with me, 'That thereafter, and on or about the 7th day of February, 1934, the defendants did organize and cause to be organized R. F. D. Discount Company, Inc.'—that is Page 3, Line 20.

That is no pretense. I think we can be in accord that there is nothing there that said that they did that. They didn't say there was anything fraudulent about it, so that doesn't help us.

And the next thing they say is, 'That thereafter and on or about the 30th day of August, 1935' they caused to be organized Investment Finance Company.

That is not a pretense. It is not a representation to anybody, one way or the other. It doesn't come within that, and that doesn't help us, does it, as to the means?

The point I am making, going back again, 'by means of false and fraudulent pretenses.' So that doesn't help us.

The Court: It doesn't help you so far as the false representations are concerned.

Mr. Irwin: Let me go on and see if I can hit the conclusion that I am coming to.

Therefore, we are up to that point. Now, why do I go back to November, 1932? Taking, if we will, Page 5, the top paragraph, Your Honor, beginning with Line 1, 'That the defendants would and did represent to the per-

sons [667] intended to be defrauded, that the First Security Deposit Corporation would and did loan and advance money only upon security or properties theretofore approved.'

That is where I believe I get my help.

Now, first of all, I want to call this point to Your Honor's attention, which may help to clear some of the fog that is before us all. If we read Line 3, 'that the First Security Deposit Corporation would and did loan'—that they represented that they would and did loan—we know whoever drew the indictment was not familiar with what the evidence would show. * * *

What evidence do we have with reference to the fact that the loans would be made only as approved by the corporation commissioner or the bank commissioner? When did it happen? It happens back when they are soliciting the investors of the Railway Mutual Building and Loan to come in to the reorganization scheme. They didn't represent—and Your Honor will recall the testimony—there was no representation that they would, and were loaning, which is what 'would and did loan' means—there was no representation there that they would and were loaning only on securities approved by the Corporation Commissioner, but the evidence was, and is before Your Honor, that in the application, as I recall it, to the Commissioner some place in there, * * * that the representation was made that they would only loan money that was approved.

Now, that allegation there we can strike out. Whoever drew that allegation did not have his evidence in mind, because at that time the corporation, the Railway Mutual Building and Loan, was threatened with going under. There is no evidence at all that they were making any loans, the Railway Mutual. The Security Deposit certainly wasn't mak- [668] ing any loans, because in November 15, 1932, they issued their securities. It wasn't until the latter part of '33 that they got their segregation of assets through, and it appears from the evidence, letters introduced by the plaintiff, that between November, 1932, and up until the segregation was completed, * * * that the First Security was dependent for its revenue upon the prorata share of returns to the Railway Mutual Building and Loan.

Therefore, Your Honor, that allegation, as I say, we can disregard as surplusage. I illustrated, though, to show that whoever drew the indictment didn't have in mind what the evidence would show, and let it read, 'that they represented to the persons intended to be defrauded'—coming back with how the scheme was to be carried out—'they represented to the persons to be defrauded that the corporation would loan money' only upon security.

Now, I state to Your Honor that that is a representation, and that, according to the evidence, was made prior to November 15, 1932—I mean November 1, 1932.

Another one: All the evidence that has been admitted here on the question of loans.

Now, again, why do I say that that is prior to November, 1932?

The Court: Before you go on to your next point, let me see if I understand this one.

Mr. Irwin: Very well.

The Court: Before I take on the next one.

I will put this in entirely different language, and simplify it, and see if I get your point.

Your point is, in essence, this: That the indictment charges that there was a scheme or artifice or a conspiracy to defraud by certain means, and that one of the means was [669] the organization of certain corporations, A, B and C, at least one of which would not be permitted to invest money in other than securities approved by the Division of Corporations, or by the Superintendent of Banks of the State of California; that it is alleged that the things were done in furtherance of the scheme so that naturally the scheme must have antedated the means. The only item of evidence in the entire record of the investment limitations in the original literature which was sent out asking that there be an exchange of securities in the Railway Building and Loan into the securities of the First Deposit Corporation, a fortiori, the scheme must have originated prior, at least, to the 1st day of November, 1932.

Have I stated your argument correctly?

Mr. Irwin: With this particular addition, Your Honor, which I was coming to——

The Court: (Interrupting) I only mean so far.

Mr. Irwin: As far as I have gone.

Mr. Campbell: I think the evidence shows that this representation was made throughout. If Your Honor will refer to the letters which were sent out, there was repeated time after time that the business was being conducted—I can't remember the exact words offhand—but that the business was being conducted pursuant to that plan and agreement, and references appear here, which I will point out subsequently—I don't take the time to do it now, but reiterating through inference or through reference that particular representation.

I thought I should call that to Your Honor's attention in view of counsel's statement.

Mr. Irwin: And I believe counsel will find himself in error, because I recall those letters, Your Honor, [670] and I believe counsel is confused. There is another representation altogether, that they represented in 1938 that they were a liquidating corporation.

I am referring now to the one that they would loan money on property only approved by the Corporation Commissioner and the State Superintendent of Banks. The original plan, as a matter of fact, says that it will be legal investments — another indication that they would loan money only on legal investments.

The Court: Well, now, the same thing has been bothering me a little, and I would like to have pointed out to me, before we finish this argument, specifically in the evidence where that representation was made, to what we have described in the vernacular as the defraudees. In order to prove the allegations of the indictment, the representation must be made to the defraudees, either directly or indirectly, to either attention, or intended to come to their attention.

Now, other than in the plan itself, where are there—

Mr. Irwin: Very well. * * * on our November, 1932, date, is found in the indictment on Page 2, commencing with Line 29, ‘that thereafter’—now, remember that up above they said that they had the scheme, and so on—‘that thereafter, and for the pretended and alleged purpose of liquidating the assets of the said Mutual Building and Loan Association, and to protect the stockholders, and security-holders thereof, the said defendants induced said persons to *be intended* to be defrauded to exchange their securities in the said Railway Mutual Building and Loan Association for securities issued by said First Security Deposit Corporation.’

Your Honor, I submit in that paragraph, if nothing else that has been said by me to Your Honor, is a substantiation of my statement that the scheme as alleged is

alleged to have existed on November 1, 1932, and that what happened thereafter, representations, and so forth, were means used to carry out that scheme.

Why do I say that, Your Honor? Because what does the word 'pretended and alleged' mean, but that it is false, and misleading. What does this allegation mean, 'that the defendants induced the persons intended to be defrauded'? By that you mean they had their intent, they already had their plan, and what other conclusion is there by that allegation but that they induced the persons intended to be defrauded—is there any other conclusion but that at that time the indictment charges there was a scheme, and thereby to defraud those persons of their property.

We are in accord—I notice the court nodded his head with me—that it certainly was before December 28, 1936, when there is the pursuance of the allegation.

Now, I believe that on this Paragraph 2—and I invite your Honor's very serious consideration, because it is the thing that has bothered me about this case from the time I first got into it—I submit that they charged one scheme, and we have been trying another one.

To elaborate: What we have been trying, your Honor, is the scheme—and what I urged before this trial ever started as to what would happen—we are trying a scheme where these

defendants are not charged but are shown in 1936 and 1935 to have taken over the Investment Finance, and from that time manipulated the affairs of the Investment Finance by loans and what not.

* * * if I may recapitulate—that the indictment positively shows that the scheme is alleged to have been [672] conceived and formed prior to December, 1936, which is the pursuant business.

Number two, that it is respectfully submitted that the representations about that they would make loans approved by the Commissioner of Corporations, that only refers to prior to the organization date of November, 1932, because I recall—and I will be glad to have counsel show any evidence hitting that allegation—I don't want him to be confused now about the ones that they later made, where they were carrying out a liquidating business—and then the clincher, for the alleged purpose and pretended purpose of liquidating the defendants induced the persons intended to be defrauded to exchange their securities—the exchange of securities is shown to have been completed on November 1, 1932.

* * * I recall the letter that went out to the Railway Mutual referring to the fact that the plan was open to inspection up in the office, I believe, in the Rowan Building or the Pacific Electric Building, inviting them up to

look at it. I don't believe that the exhibit—which I will get for Your Honor—I don't believe there is anything said in it as to what the investments would be in the letter.

Mr. Lawson: You may make that statement.

Mr. Irwin: I am assured that I can make that statement fairly."

"The Court: * * * the motion to strike as made must be denied and exception allowed. * * *

Now, as I say, this taking out, or attempting to take out, the bottom from the plaintiff's case has been very well done by counsel. I think it has been beautifully presented. It may be that some other court would agree with [673] counsel. I just don't happen to, but that is just counsel's and the defendants' hard luck, but we did that so if I did agree with them we wouldn't need to sit around here for several days in *grguing* because I would set the defendants free tonight if I agreed with them.

Now, the motions to strike on other grounds as to particular exhibits, as to particular parts of the testimony, may proceed. I will ask counsel to reduce those pretty much to writing so that we may proceed very rapidly."

* * * * *

"Mr. Lawson: Your Honor, if you will indulge me just for a moment, not that I like to hear the sound of my voice, but I think

that this places me in a rather awkward position with regard to the motion to strike on behalf of my clients.

Now, I am going to, as I indicated, of course, adopt all of the argument and the points of Mr. Irwin. There will be some supplemental remarks connected with his argument that I want to add to it, and then I do want to take a little time to emphasize what I consider as the most important points.

I think that there are certain documents here in evidence that are very important to the case, and I am not going to spend very much time on anything except what I consider the real danger points. *I wouldn't take me very long.*

I will, over the week-end, boil everything down so that I will have it ready to deliver to your Honor in concentrated form, but the exhibits are all here, and I would like to have the privilege of arguing orally the motion to strike on behalf of my clients."

"The Court: No, I can't take the time for that. * * * Now, I will put the same requirement on all you gentlemen, to [674] make the rest of your motions and your arguments, your points, your authorities, and everything, in writing, and get them to me by 3:00 o'clock on Monday. * * *

"Mr. Lawson: I don't like to be insistent, but I do want to make this further statement.

I will say that, frankly, I do not think I will have the time available, consistent with the other duties in connection with the preparation of the defense, to follow the procedure as suggested by your Honor.

I would like to accomodate your Honor in that respect, but I do not think that I can do it as effectively as I could by oral argument.

The Court: That is going to be your tough luck, because I will not take the time of all these counsel to listen to any more oral argument."

"Mr. Lawson: Your Honor, I am going to really request that I be given that opportunity because—

The Court: I will have to deny it. I am sorry.

Mr. Lawson: I wish to take an exception.

The Court: Yes.

Mr. Irwin: Might I, in this connection—

The Court: You were given an opportunity to add to it today. You said that you had nothing to add to the argument.

Mr. Lawson: In regard to that one point, your Honor, and I do not intend to cover that one point, of course. I concluded on that point, but there are other things in this record that I could refer to in the documents, that I could explain to your Honor, and get the benefit of your Honor's reaction the same as you have given your reaction to the argument of Mr. Irwin on this point, particularly with

reference to the report of Mr. Dean Campbell, and [675] the statement of Mr. Twombly.

I will say this, your Honor, we have been in trial now for four weeks, and there is an accumulation of testimony, and I have had to try this case in a form that I have not been accustomed to: That everything has been reserved on a motion to strike; and it makes it a little bit difficult, and I don't believe that I should be restricted in any sense of the word as to how I should protect the interests of my client.

If I may respectfully state to the court, as to what the plan, the best plan, the court would think should be followed, I think that the defendants here are entitled to insist upon this procedure, if, in their judgment, they think it is the proper one to follow.

The Court: I am sorry. I happen to be in charge of this court."

* * * * *

Mr. Lawson: I will say, your Honor, that it isn't because of any other business outside of this case. There is much to be done in the preparation of the defense."

* * * * *

"Mr. Lawson: If your Honor is referring to me, I don't care to make a speech, and that isn't what I have in mind at all, but I am just simply calling your Honor's attention to it, that if this case had been tried, as I have been

accustomed, as ordinarily tried, when a document is presented you get up and you object, and you state the grounds of your objection; you have the document before you, and the matter is passed upon at that time.

The Court: Have I declined to pass on any?

Mr. Lawson: I am not criticizing your Honor. I am just simply stating it from my standpoint. It isn't a [676] question of not being willing to write out objections, but the particular documents that I have in mind, and the points, I want to be here with the documents, and read from them and point out in particular the objectionable parts. In other words, to have the same opportunity to point out to your Honor the objectionable part of those documents as I would have had if the objection had been passed upon in the usual manner."

* * * * *

"The Court: There are two ways of ruling on objections: You can tell the plaintiff to put them in, and limit them to a particular person, and then the Government will be required to make them applicable to all. I have never followed that policy. I have followed the other policy in every one of these conspiracy cases that I have had."

* * * * *

The Court: Now, I have ruled on the pending motions, which were adopted by Mr. Lawson. I ruled on those. Those are through. Now,

if Mr. Lawson thinks that he should have some additional matters in connection with those motions already made, he may start out his written document by any arguments, calling my attention to any documents that he wishes in that connection, in order that he may supplement Mr. Irwin's reply to Mr. Campbell.

Mr. Lawson: Your Honor, I don't know if the record shows that the motion is formally made on behalf of the Defendants Edgerton and Ireland. So as to make it certain, it will be understood by your Honor that the motion to strike evidence on behalf of the Defendants Edgerton and Ireland is made on the same grounds, the same specifications, and for the same reasons, and upon the same argument as stated by Mr. Irwin in his motion with reference to his plans. [667]

The Court: It is all in the record.

Mr. Lawson: I just wanted to make certain.

And then whatever additional argument is to be in writing, is to be supplemental in addition to whatever points Mr. Irwin has brought out.

The Court: Yes." [678]

Thereafter the following motion was filed on behalf of the defendants Ireland and Edgerton:

No. 10136

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. HOWARD EDGERTON and CLIFFORD W.
TWOMBLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Three Volumes
VOLUME III
Pages 899 to 1191

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

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**Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division**

"In the District Court of the United States
In and for the Southern District of California
Central Division.

No. 14943-RJ

Criminal

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. HOWARD EDGERTON, et al.,
Defendants.

To the Honorable Ralph E. Jenney, Judge of
the Above Entitled Court:

The following is a continuation of the Motion to Strike on behalf of the Defendants Ireland and Edgerton. Previously, this Motion has been argued orally before the Court, and at the request of the Court for the remaining portion of the argument it is herewith submitted in writing. As stated before Your Honor in Court, we except to this procedure, but will endeavor to comply therewith with the facilities available and limited time at our disposal to argue the Motion in writing.

It is our understanding by adoption we may and do hereby include as though fully set forth herein, the grounds and argument as to the evidence which counsel for Defendants Starr, Thomas and Smale has set forth in his written Motion to Strike on file herein, insofar as the

same is applicable to the Defendants Ireland and Edgerton.

Generally speaking, the Motions to Strike on behalf of the Defendants Thomas and Smale are applicable to the Defendant Ireland, with the exception of one distinction, [679] which will be hereafter pointed out. Ireland was identified with the Railway Mutual Building and Loan Association, the First Security Deposit Company, the Investment Finance Company, and the R. F. D. Discount Company, later the Consolidated Investors Company, over approximately the same period of time, and at intervals was in common with Smale and Thomas a Director in those companies. As to Ireland, however, there is this vital distinction: He was at all times an employee, and as such devoted his full time to the various enterprises. His salary ranged from \$125.00 to \$200.00 a month. He did not occupy any executive or key position. His voice is not heard in shaping or directing policies or management. True, he was a member of various Committees, but only in subordinate capacities. It is a fair inference that whatever he may have done as a Director or a Committee member that it was done as a matter of convenience of his employers. By tracing the activities of Ireland through the minutes of the First Security Deposit Company and the minutes of the Investment Finance Company, the conclusions herein stated can be established.

The following will be confined to the Motion of the Defendant Edgerton to Strike, which is supplemental and in addition to the specifications, grounds and argument on behalf of the Defendants Starr, Thomas and Smale, as hereinabove stated. An attempt will be made to classify objectionable evidence because we believe that Edgerton's connection with the evidence requires classification. In doing so, however, we do not waive the more specific analysis of identified objections by Mr. Irwin.

It will be recalled that Mr. Edgerton is and was at all times wherein he is mentioned in the evidence, an Attorney at Law. He was at all times, wherever he is mentioned in [680] the evidence, counsel for the Security Company, the Finance Company and the Collateral companies, and acting in that capacity. Parenthetically, for brevity, we shall hereinafter refer to the First Security Deposit Company as the Security Company, and the Investment Finance Company as the Finance Company. Edgerton was never a Director or officer of the Security Company until he became manager of that Company October 9, 1938, which is the only office, if this be considered as an office, which he held. He was one of the incorporators of the Finance Company and a director thereof from date of its organization, August 5, 1935, until February 16, 1938, when he resigned. His name appears in the Minutes of the Finance Company as Vice President, but with rare ex-

ception do the Minutes show that he exercised the prerogatives of that office. Edgerton was appointed Attorney of Security Company on February 19, 1936, (Exhibit 18, Minutes of that date). Prior thereto the law firm of Nourse, Betts and Jones, with which firm Edgerton was associated, were the attorneys, and whatever Edgerton did was as a representative of that firm, up to February 19, 1936. The identity of that firm with the evidence commenced presumably in the middle of 1933 in either the month of June or July.

The defendant Edgerton does hereby move to strike from the evidence and all testimony connected therewith Exhibits 18, 19 and 20, which constitute the Minute Books of the Security Company, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant Edgerton, as it does not appear that he had any knowledge of, or participated in any of the matters therein referred to as related to the scheme to defraud and the conspiracy, [681] as alleged in the Indictment.

4. The Government has failed to connect up the defendant Edgerton with said Exhibits.

Said defendant further moves to strike on the same grounds as hereinabove stated as to Exhibits 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 136, 136-a, 136-b, 138, 139, 139-a, 140, 141, 141-a, 142, and 73. The

foregoing exhibits, up to Exhibit 136, are records of the Security Company, such as Journals, Bond Register, Check Record, Cash Receipt Journal, Stock Ledger, General Ledger, Transfer Binder, etc. The Exhibits numbered from 136 on are miscellaneous correspondence in the early stages of the company's operation.

The evidence shows that Edgerton's only relation, if any, to these documents, was as counsel up to February of 1936, as a representative of the firm of Nourse, Betts and Jones, and from and after February 19, 1936, as a counsel in his individual capacity. He attended the meetings of the Board of Directors as counsel, and if his presence at the Board meetings is to be concluded as imparting knowledge to him of the matters recited in the Minutes of those meetings, those minutes reflect that he acted as an attorney upon those matters, which were submitted to him for his consideration. Whether his advice was good or bad is immaterial, so long as he acted as an attorney in good faith, and it is submitted that the Minutes are conclusive on this point. Clearly, his position as attorney does not impute to him knowledge of the records of the company embraced within the Exhibits other than Exhibits 18, 19 and 20.

If it be concluded by Your Honor that the position of Edgerton is not tenable from and after October 9, 1938, when he became General Manager of the Security Company, then

we [682] submit that all of the portions of Exhibits 18, 19 and 20 and the other records of the company up to said October, 1938, should be excluded for the reasons as hereinabove stated.

The case of United States vs. Wise, 102 Fed. (2d) 379, is in point. This was a prosecution for conspiracy to use the mails to defraud, involving the sale of commercial paper secured by fraudulent warehouse receipts. The evidence showed that certain of the defendants organized, controlled and managed a corporation known as the Continental Credit Corporation, and that this corporation issued the fraudulent paper. The defendant Wise was an attorney. He represented the Continental Credit Corporation in various employments. At one time when certain of the other defendants were ill he managed the corporate business for a period of a few weeks. He never attempted to sell any of the notes or dictate the company's policy. There was no evidence that he had profited by the frauds. The Court said, at page 381:

‘It may seem almost axiomatic to say that the investigation of crimes and the detection of the guilty participants usually involves a study of motives and intent. The presence of intent calls for the existence of knowledge. Fraud, civil or criminal, is almost always practiced for gain, where-

in springs the motive. To make money or to get possession of money or its equivalent usually prompts those who practice fraud and those who scheme to defraud. When a fraud is uncovered there usually follows a disclosure with someone profiting out of the fraud.'

And again at page 382:

'Participation in a fraudulent scheme is usually accomplished by secrecy of plans, the concealment [683] of action. Yet Wise, before accepting a position with Continental, some 30 days before the Receiver was appointed went for advice and guidance to the Indiana State Banking Department, the head of which believed his participation in the company would be helpful and encouraged him.'

Further,

'No version of this evidence and no construction can be given to any transaction which supplies a motive for, or an intent by Wise to defraud, and indeed strange would be a fraud where its promoter had neither a gainful incentive or an intent to assist others in illegitimate efforts at enrichment.'

The evidence in the case at bar shows that Edgerton started to practice law in the office of Nourse, Betts and Jones in 1931, and as a representative of that office he handled the work

of the Security Company up to February of 1936. Whatever compensation he received was presumably paid to him by that firm from and after February of 1936, when he acted as counsel individually. The minutes and the records show that his compensation for his services were modest and consistent with his employment as Attorney, and there is nothing in those records or Minutes which have any materiality as bearing upon intent for participation in the scheme or conspiracy, as alleged. It may also be fairly assumed that having acted as counsel under the direction of Nourse, Betts and Jones, that he was justified in continuing as counsel for the company in his individual capacity, and that he was acting in the best of faith. See also the case of Firpo vs. United States, 261 Fed. 850, wherein the appellant was an attorney-at-law who was convicted of procuring a [684] soldier to desert from the army and of counseling the deserting. It appeared that the appellant had expressed an opinion to the soldier's father that there were legal grounds for his exemption from service. In these circumstances, the Court in reversing the conviction, stated, (Pages 852-853) :

‘If there appeared to the plaintiff in error reasonable grounds for the expectation of success, it was not criminal for him to advise his client to remain away from the authorities. At least such would be true in the absence of bad faith or criminal

intent on the part of the plaintiff in error. To assist, as used in the statute, applies guilty knowledge and felonious intent. Knowledge of the wrongful purpose of the deserter. To assist with such knowledge and intent is serving the purpose of the deserter. It encourages him and aids him and thus the offense may be committed. To assist, like to abet, involves some participation in the criminal act. To advise a client to commit an act which is a crime makes the lawyer an accomplice, and at common law he would be an accessory. We are not satisfied from this record that there was evidence to submit to the jury indicating a knowledge on the part of the plaintiff in error that Shillace was a deserter and was continuing in his desertion from the service of the Army of the United States at the time when he was advised to remain away and go to Connecticut, where it was suggested that he had relatives. Indeed, the plaintiff in error's view seems to have been that Shillace was wrongly kept in the Army and that he was entitled to discharge by reason of his age. We think [685] the plaintiff in error was giving his best advice, and opinion, as to his client, without any intent of violating the law and in doing so what he thought was the realm of his professional obligation his client.'

An examination of Exhibits 18, 19 and 20 will show that Edgerton was at all times advising his client, the Security Company, in the best of faith, and that many times he gave advice which was not accepted. (See Minutes of February 20, 1935, and of May 15, 1935, Exhibit 18).

Defendant Edgerton moves to strike from the evidence the following Exhibits on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon this defendant or connected up by the Government with this defendant, and not bearing upon any of the issues in this case.
4. No proper foundation.

Exhibits 131, 132, 133, 134, 135 and 137.

The foregoing comprise correspondence relative to the reorganization in its preliminary stages from December 10, 1931, to July 19, 1933.

Defendant Edgerton moves to strike from the evidence the following Exhibits on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon this defendant or connected up by the Government with this defendant, and not bearing upon any of the issues in this case.
4. No proper foundation.

Exhibits 103, 104, 105, 106, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 72-a, [686] 72-b, 72-c, 75, 76, 95, 96, 97, 98, 99, 100, 101, 102.

These Exhibits relate to the activities of the R. F. D. Discount Company, later named Consolidated Investors Company, in connection with what has been referred to in the evidence as the Reed Brothers transaction, and secondly the transfer of the assets of the Consolidated Investors Company to the Finance Company for a consideration of \$36,000.00. The emphasis placed upon this evidence is all out of proportion to its importance or materiality, if any. We assume that in part the Government intends to prove by this evidence that the defendants intended to secure stock control of the Security Company and the Finance Company. This much we will stipulate to. It was not only the purpose, but the plan of the defendants to do this very thing, deemed necessary to carry out the purpose of the original plan and agreement. An examination of that document will disclose that the defendants had the right to secure such control, if not a duty to maintain it, and upon the face of all of the Exhibits above referred to there is nothing of an illegal character. To allow this evidence to stay in the record is to create a false issue before the jury. In other words, the defendants may be tried in great part upon the management of that company. These Exhibits show

that the defendants organized the R. F. D. Discount Company and transferred thereto their personal assets, consisting of securities of the Security Company and they later caused to be transferred by the Consolidated Investors Company those assets to the Investment Finance Company for a consideration of \$36,000.00, which was in turn re-invested in the Finance Company, with the exception of \$5,000.00, whereupon the Consolidated Investment Company was dissolved. For his services in connection with the Reed Brothers transaction, [687] Edgerton received a fee of \$1,000.00. There is no showing but what the same was a reasonable fee.

Defendant Edgerton moves to strike from the evidence the following Exhibits, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant or connected up with him by the evidence.
4. No proper foundation.

Exhibits 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45.

The foregoing relate to the Minute Books (Exhibits 36, 37 and 38), and general records of the Finance Company, including the Journals, Ledgers, Cash, Check, Securities and Sales Records, etc. The same argument to strike these Exhibits from the records that was made on behalf of the Security Company's records, is applicable, with the added feature that Edger-

ton was a Director in the Finance Company from August 5, 1935, to February 16, 1938, and appears on the Minutes as a Vice-President throughout. It is submitted that an officer of a corporation is not criminally answerable for any act of the corporation in which he is not personally a participant. (See authorities cited and discussed in our Brief on file with Your Honor, pages 7 to 20).

Any statutory provision which attempts to fasten upon a Director of a corporation criminally guilty knowledge of the affairs of such corporation in the absence of actual knowledge is unconstitutional. (See cases cited, and discussed in our Brief, pages 23-27.)

It should be added that Edgerton was appointed General Manager of the Investment Company on October 19, 1938, but whatever bearing this may have upon acts of the corporation subsequent to that date is not to be confused with acts [688] occurring prior to that time.

Defendant Edgerton moves to strike from the evidence the following Exhibits, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon the defendant, nor within the issues of the case, nor has he been connected up therewith by the Government.
4. No proper foundation.

Exhibits 47, 48, 49, 50.

These relate to the records of the American Building and Investment Company, which we submit is a purely collateral matter, and has no bearing upon the issues within this case.

Defendant Edgerton moves to strike Exhibit 107, on the ground that it is:

1. Immaterial.
2. Not binding upon this defendant, nor within the issues of the case.
3. No proper foundation.

This is Cashier's Check dated March 26, 1934, to Realty Deposit.

The next classification will relate to the so-called victim evidence, which may be submitted and argued as a class.

Defendant Edgerton moves to strike from the evidence all of the testimony of the following named persons, and the Exhibits relating to such persons, as hereinafter set forth under their respective names, on the grounds that they are:

1. Hearsay.
2. Immaterial.
3. Not binding upon Defendant Edgerton, nor connected [689] up with him.
4. No evidence showing that the letters of Investment Finance Company or of the First Security Deposit Company were written or mailed with the knowledge, consent, or authorization by defendant Edgerton.

Mrs. D. F. Talamantes (Counts 5 and 14), Exhibits 159, 166, 182, 183, 184 and 185.

Dr. F. W. Kidder (One of the Overt Acts in 15th Count) Exhibits 186 and that portion of Exhibit 45, page 1033, (page 1656 of Transcript which was right under the evidence).

Grace G. Benn (Count 11), Exhibits No. 187, 188, 189, 156, 163, 163-a, 190.

Fred O. Morse (Count 8), Exhibits 191, 192, 193, 158, 161, 164, 194, 195, 196, 197, and 198.

Audra D. Jones, Exhibit 199.

Mary L. Wisely, Exhibits 200, 201, and that portion from Exhibit 45, purchase order No. 971, dated April 6, 1938, read into the record at page 1779, Transcript.

Leland H. Bidleman (Counts 1 and 9), Exhibits 202, 202-a, 203, 204, 205, 167.

Clarence M. Hicks, Exhibits 206, 207, and 208.

Alice Geddes, Exhibits 209 and 210.

Wade H. Robinson, Exhibits 211 and 212.

Lyman S. Walker, Exhibits 213, 214 and 215. [690]

Dennis S. Taylor (Count 6), Exhibits 168, 160 and 165.

George U. Richmond, Letter of July 19, 1938, Exhibit

All of the foregoing refer to what has been referred to as 'victim evidence.' It will be noted that the last letter sent dated October 31, 1938, to Mrs. Talamantes, referred to in the

Fourteenth Count, is the month in which Edgerton was appointed General Manager of the Security Company, and also of the Investment Company, and did not in reality assume his duties as such, until the following month of November, 1938. In other words, the letters referred to in the first Fourteen Counts are letters mailed at a time when the defendant Twombly was General Manager of those companies, and do not span the time when Edgerton was in charge, except for the brief hiatus between the dates of his appointment, October 9, 1938, in the Security Company, and October 19, 1938, in the Investment Company. Some of the carbon copies introduced into evidence bear the initials of Edgerton, patently submitted to him for his approval as counsel, and it is submitted that in the letters there is nothing of a criminal character or that could be construed by him as such. It will be presumed that such letters that did not bear his initial were without his authority or approval, even as attorney. There is no evidence in the record of the Minute Books of either the Security Company or the Finance Company or in any other part of the record that shows the specific authority by Edgerton to either Twombly or Cronk to write any of the letters above referred to, or to perform or do any act in connection with the subject matter thereof, which authority we submit is necessary to bind Edgerton. It will be noted in this connection that there is

no evidence in the record showing that Edgerton [691] gave any instructions or authority in connection with any matter except the expression of a legal opinion, and particularly is this true up to and including the time when he became General Manager of the Security Company and the Investment Company.

The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application in criminal law. If a principal is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. (See our Brief, pages 27-a, and pages 82-88).

Defendant Edgerton moves to strike from the evidence the following testimony and the Exhibits related thereto, on the following grounds, that it is:

1. Hearsay.
2. Immaterial.
3. Not binding on the defendant Edgerton, and not connected up by the Government with the Defendant Edgerton.
4. No foundation.

Joan Marie Brauer

Exhibits 156, 157, 158, 159, 160, 161, 163, 163, 164, 165, 166, 167 and 168.

Defendant Edgerton moves to strike the testimony of the witness Myron W. Reed and Exhibits 108, 109, 110, 111, on the grounds that the same are:

1. Hearsay.

2. Immaterial.
3. Not binding upon the defendant Edgerton and not connected up with him by the Government and relating solely to collateral matters and not within the issues.
4. No foundation.

Defendant Edgerton moves to strike from the evidence [692] the following Exhibits relating to the Pierce Petroleum matter, and all other matters in the record relating to the said transaction and not herein specifically mentioned, on the grounds, that the same are:

1. Hearsay.
2. Immaterial.
3. Not relating to any of the issues of the case and not binding upon the defendant Edgerton, nor are they connected up with him by the Government.

Exhibits 80, 81, 83, 84, 180 and 181.

Defendant Edgerton moves to strike from the evidence and all records therein the comments of H. Dean Campbell in his report to the Board of Directors of the Investment Finance Company, contained in Exhibit No. 46, and also appearing in the Transcript, pages 196-197, on the following grounds:

1. That said statements are hearsay.
2. Said statements are immaterial.
3. Said statements are conclusions.
4. Said statements are not binding upon the defendant Edgerton, nor connected up with him by the Government.

5. Said comments contain expressions of opinion on matters specifically excluded from evidence by other rulings of the Court.

6. That if permitted to stand in the record said comments will impose upon defendant Edgerton the burden of proving his innocence.

7. Said comments create prejudice in the minds of the jurors and create false issues in the case.

8. Said comments have no bearing upon the specific intent with which the defendants are charged in the indictment. [693]

The witness Long testified that the report was received by the Finance Company and placed in the files of the company. (Transcript, p. 196-197). This is the only foundation for its reception.

These comments are, in our opinion, clear hearsay. Any attempt to make them a part of the files of the company does not cure that weakness. If a showing had been made that it was customary to receive such comments from their auditor, that he had been requested to make them, and that it was the practice of the company to keep such comments as a part of their records, there may be some justification for admitting this evidence in record, but even in that event it is extremely doubtful. There was no showing that Mr. Campbell was not available as a witness. In fact, it can be stated that Mr. Campbell has at all times been available and was in the Courtroom during a

part of the trial, and we are under the impression that he was in the Courtroom on the day that these comments were read into the record. The admission of this evidence deprives the defendants of cross-examination. The statements are in the nature of an accusation, and no limitation the Court could place upon their reception into evidence can cure the damage. The Government introduced this evidence upon the theory that it shows intent on the part of the defendants. How can the declaration of a third party prove the intent of the defendants without assuming the truth or falsity of the comments? By specious reasoning, this evidence would imply a duty on the part of the defendants to either affirm or deny the truth or falsity of the statements, and by such declaration or their conduct would indicate their intent. We surely should not be so naive to assume that the Government intended an implication that the statements were false. [694] Plainly, it is intended to imply that they are true. The limitation of intent was placed upon these comments by the Government after objection and argument, and was originally offered without any limitation. As stated, when the evidence offered, we again repeat that if Mr. Campbell were to take the stand he would not be permitted to testify to the opinions stated in the comments. The transmittal of his report containing these comments, we submit, is not on the same

basis of any conversation which Mr. Campbell may have had with defendants with respect to these matters.

Defendant Edgerton moves to strike all the testimony of the witness C. E. Webster, starting at page 1962 of the Transcript, and Government's Exhibit 216, which is the statement of defendant Twombly, on the grounds that it is:

1. Hearsay.
2. Immaterial.
3. His statement not made in the course of the conspiracy, but made after termination of Twombly's connection therewith, and after the termination of the conspiracy, as alleged in the indictment.
4. Not binding upon the defendant Edgerton, not within the issues of the case, nor connected up by the Government as to the Defendant Edgerton.
5. The statement is a recital of the conclusions of Twombly.
6. A narration of past events and not material for the limited purpose for which it was introduced, to wit, to show the intent of the defendant Twombly.
7. Of such a prejudicial character that the limitations placed upon its reception in evidence by the Court cannot cure such prejudice.
8. Burden of proof is placed upon the Defendants to [695] prove their innocence.
9. Insufficient foundation.

We realize that this statement was offered for the limited purpose of showing the intent of the defendant Twombly, and that it was excluded as to the other defendants. We also realize that there is considerable latitude given to the Court wherein matters bearing upon the question of intent may be admitted. If this were the only evidence available to the Government to establish the knowledge of Twombly as to the matters recited in his statement and from which knowledge intent could be inferred, then probably, but in our opinion still doubtfully, could such evidence be tendered. But the complete records were in evidence, and from which the inference of knowledge and intent can be inferred, and there was no necessity for the introduction of the statement which at best would be cumulative.

Defendant Edgerton moves to strike from the evidence all of the testimony of the witness Clarence N. Bruce, on the following grounds, that it is:

1. Hearsay.
2. Incompetent.
3. Not binding upon the defendant Edgerton, nor connected with him.
4. Containing statements of matters not involved within the issues of the case.
5. Statement of opinion and not of fact.
6. Statements of summaries based in part upon immaterial matters, while purporting to

be a summary of facts based upon material matters.

7. Insufficient foundation.

We call the Court's attention to our previous observations with reference to the connection of Edgerton with [696] the various enterprises involved for an admitted period when he was only counsel, and not acting as an officer or director of the Security Company, and the Finance Company, and the records upon which the witness Bruce predicates his summaries include those exempted periods of time. We also call to the attention of the Court that the summaries of Mr. Bruce, particularly with reference to discounts and profits and loss, are based upon a discount from the par value of the securities, and not on a discount from the market prices thereof.

Respectfully submitted,

GORDON LAWSON,

Attorney for Defendant Edgerton." [697]

* * * * *

The Court:

"Now, I have given very careful consideration to these motions to strike. I don't think the legal literature would be enriched by any discussion of mine in connection with the matter, and I don't think that counsel for either the Government or the defendants would learn anything that they don't already know, so I am not going to waste their time. I have come to

the conclusion that the motions to strike as to the defendants Edgerton, Starr, Thomas, Smale and Ireland must be denied in toto.

Mr. Irwin: Exception, please, your Honor.

Mr. Lawson: Exception.

The Court: That is the ruling of the Court. Exception allowed as to all defendants. I say that in order not to waste time by the plaintiff discussing those matters. I find, under my view of this case, that for the present at least the motion should be denied and the evidence should stay in."

"The Court: * * * I wanted to have the motions for directed verdict, insofar as is possible, before me to give them consideration as, of course, they are something else again different from the motions to strike. After we consider the motions to strike, insofar as the defendant Twombly is concerned, I then suggest to all of counsel for the defendants that they file their formal motions for directed verdict and add any other elements upon which those motions may be predicated. It may be that counsel will feel that they are sufficient simply to move that they be considered that they may be deemed to have been made in accordance with the written motions, and that the written motions be filed with the clerk, which will be permitted. If they have anything to add, I shall be glad to listen to that. To what extent I shall listen to any [698] argument on

those directed verdicts, I will keep my mind open until we finish with this matter this morning."

Thereafter the plaintiff then argued in opposition to the written motion to strike filed on behalf of the defendant Twombly, during the course of which the following proceedings were had:

"Mr. Campbell: * * * As to the approval by the superintendent of banks, that is a legal matter for instruction.

The Court: Where are you now? You are at the bottom of page 10?

Mr. Campbell: At the bottom of page 9 and top of page 10?

The Court: Now, wait a minute. In one sense yes, and in another sense no. As I view this record, the situation is substantially this: There is an allegation in the indictment, clarified to some extent, at least, by the bill of particulars furnished by the plaintiff, charging that representations were made to certain specified persons or persons in a certain class; that the assets transferred out of Railway Building and Loan to First Security Deposit Corporation would be invested only in investments approved by the Superintendent of Banks or the State Corporation Department. Now, suppose they did. There is no evidence in the record to indicate that that representation isn't 100 per cent true, particularly as to the State Corporation Department. We needn't

consider the question of whether it is a matter of which the Court might take judicial notice or whether it is a matter of common knowledge as to the class of investments approved by the Superintendent of Banks; but there certainly could be no such judicial or common knowledge as to the State Corporation Department because the State Corporation Department acts only in a particular instance and there is [699] no evidence that the Corporation Commissioner didn't act. No representative of the banking department, no representative of the Corporation Commissioner was ever put on the stand and said, 'We never passed upon any application. No application was ever made to us.'

As I see the record, the representation is there but the falsity of the representation has never been proved.

Mr. Campbell: I disagree with your Honor in that regard because the evidence, as I view it, shows that certain properties, certain funds, were converted to the use of the defendants themselves; and if that fact is established, that then is proof of the falsity of that representation. But aside from that, without arguing that proof at all, if that were true, if there were no proof—let's assume for the purpose of argument that there is no negative proof here that there was no such allegation: That then would be a matter for instruction.

The Court: That there is no such—

Mr. Campbell: We will assume that the rec-

ord shows barely that the representation was made and nothing more.

The Court: Yes. You said no such allegation.

Mr. Campbell: No, I didn't mean that, but the record stops there. That then is a matter, I submit, for the instruction of the Court to the jury, that there has been no evidence offered by the plaintiff or that there has been no evidence received showing that that was a false representation and, therefore, the jury cannot consider it as such. This is not a motion to strike from the indictment.

The Court: That was the point of my original remark. I don't think you can strike something that is negative, and I don't think that it has any place in a motion to strike, but I am simply calling counsel's attention to it because, as [700] I indicated in my preliminary remarks, I am going to say to the jury that allegation of the indictment must be ignored by you because it has no bearing upon the case, no evidence having been introduced to show that it wasn't true.

Mr. Campbell: Assuming that the record stands in the same state."

* * * * *

"The Court: May it be stipulated that as to all of the defendants except the defendant Twombly, whom I will cover by a separate stipulation, that at this point there may be deemed to have been made motions for a di-

rected verdict in form as indicated in written motions which are now before the Court and that those motions may be filed in the records of the case as exhibits next in order of the defendants and, therefore, need not be copied into the transcript?

Mr. Irwin: May I make this observation, if your Honor will permit it: I question, if I may, your Honor, whether or not it may be marked for an exhibit and be properly incorporated in the record, because it really isn't evidence."

* * * * *

The Court:

"May this be the stipulation: that each defendant, through his counsel, with the exception of the defendant Twombly, may be deemed at this time to have made an oral motion in open court for a directed verdict in the form and wording as indicated in the written motions for directed verdict which were handed to the Court yesterday and which are now in court; that each of these motions for directed verdict may be copied into the record with like effect as though they had been read in open court.

Mr. Campbell: So stipulated.

Mr. Lawson: So stipulated." [701]

Which said written motion for a directed verdict was in the words and figures following:

"In the District Court of the United States in
and for the Southern District of Califor-
nia, Central Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. HOWARD EDGERTON, et al.,
Defendants.

MOTION FOR DIRECTED VERDICT

Pursuant to the order and direction of this Court, made on March 20, 1942, hereinafter submitted in writing, defendant J. Howard Edgerton's written motion for a directed verdict of not guilty, the defendant, through his counsel, wishes the record to show that objection to this procedure is made and exception is taken on the grounds that:

1. He is required to state a motion for a directed verdict before the Court has ruled on the Motion to Strike, which it is respectfully submitted places an incongruous burden upon him.
2. That the great mass of evidence tending to support the Motion for a directed verdict is contained in the voluminous Exhibits heretofore received in evidence, which have not been copied into the transcript, and therefore in the time permitted cannot be the subject of a careful written analysis and Briefs.

The Defendant, J. Howard Edgerton, through his counsel, Gordon Lawson, moves this Honorable Court to direct the jury to return a verdict of not guilty on the following grounds:

1. There is no substantial evidence to show the existence [702] of the scheme charged in the first fourteen counts of the indictment; there is no substantial evidence to show the existence of the conspiracy charged in the remaining count of the indictment;
2. There must be substantial evidence on each and every essential element of the crime charged, otherwise it is the duty of the trial court to direct the jury to return a verdict of not guilty.

(a) There is no substantial evidence to show that if (but in no way conceding) the scheme charged in the first fourteen counts of the indictment, has been shown to have been devised as charged, that the defendant J. Howard Edgerton with knowledge of its existence, participated in said scheme; that as to the conspiracy charged in the remaining count of the indictment, if it is shown that such a conspiracy existed there is no substantial evidence to show that the defendant with knowledge of such scheme participated in or furthered the objects of, said conspiracy;

(b) There is no substantial evidence to show that the defendant J. Howard Edgerton did with specific intent do any of the acts charged

in the indictment, that is to say specifically intended by any act of his or at all to become a party to or further the object of the scheme charged in the first fourteen counts of the indictment; nor did he with specific intent become a party to or further the objects of the conspiracy charged in the remaining count of the indictment;

(c) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or any of the other defendants herein, did depress and/or cause to be depressed, the market price of the securities of First Security Deposit Corporation, as charged in the indictment, and that as [703] a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, as further charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(e) That there is no substantial evidence, or any evidence, to show that the defendant J.

Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method, as charged in the indictment.

(f) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

3. There is a fatal variance between the allegations [704] as charged in the indictment, and the proof, in that:

(a) From the indictment it appears, as construed by counsel from the date of his association in the case, that it is alleged that the scheme charged was formed on or about November 1, 1932, and there is no substantial evidence that the scheme charged and/or the essential elements in the scheme, are not shown by any substantial evidence to have existed prior to November 1, 1932.

(b) If Government counsel's contention first announced in the limited argument on the Motion to Strike as heard before your Honor March 20, 1942, is correct, i. r., that no fixed time limit is set in the indictment, and that it is a question for the jury to determine whether the scheme was formed any time prior to the mailing of the letters, then and in that event it is respectfully moved and urged that the indictment is fatally defective in that it does not state the offenses charged with certainty, and that the whole indictment should be quashed for that reason, and on that ground it is so urged.

4. Because upon the entire record the testimony fails to sustain the charges made in the fourteen substantive counts of the indictment and/or the remaining conspiracy count of the indictment and does not exclude all other reasonable hypotheses of innocence; and because, upon the whole record, a verdict of guilty could not be said to be sustained by the facts and circumstances as they appear which are at least as consistent with innocence as with guilt.

It is respectfully requested that the Motion herein made, together with all the grounds urged, be incorporated in the record outside the presence of the Jury, together with the ruling of the Honorable Court.

Respectfully submitted,

(Signed)

GORDON LAWSON,

Attorney for Defendant Ed-
gerton." [705]

* * * * *

"Mr. Lawson: I take it from what your Honor has said that your Honor does not want any oral argument.

The Court: Not at this time. I just want to get the record clear as to points. If you had any other points that you thought about since, I wanted to give you a chance to put them in.

Mr. Lawson: No, your Honor, I think everything is in the motion that is filed.

Mr. Irwin: May I hedge, as we say, for a moment, your Honor? I think this point is included in my original motion under No. 10 on page 2, line 7, wherein I stated there is no substantive evidence to show the existence of the scheme. I did not particularize, and should for any reason it be stated that I haven't brought it directly to the Court's attention, I believe what I am about to say is included in that ground, but I would like to particularize one sentence, that the further ground on behalf of the defendants Starr, Smale and Thomas individually, that it may be deemed made individually at this time, and request the Court to return a verdict of not guilty on the ground there is no substantive evidence in the indictment.

The Court: To direct the jury to return a verdict of not guilty.

Mr. Irwin: To direct the jury to return a verdict of not guilty, that there is no substantive evidence in the record to substantiate that

portion of the indictment which alleges that the defendants did cause to be depressed and did depress the market prices.

Now, as I have stated, I think that is included in my general motion. In case it is not, I want to add that particular ground and set it forth along with those I have [706] heretofore covered.

The Court: I think it is covered. Let me ask you a question. You have had a lot of experience in these matters, all of you. We have matters to which I have called counsel's attention where an allegation is made in the indictment upon which there is no proof offered by the plaintiff in substantiation of that allegation. It has been my practice to instruct the jury, if that condition remains at the time of the instructions, to give no consideration whatsoever to that element of the indictment because no proper proof has been produced by the plaintiff in substantiation of it. Now, I, of course, couldn't grant a motion for a directed verdict on one of those things. If there was sufficient left in the indictment, assuming that there are a half a dozen of those cases, if there was still sufficient in the indictment upon which the charges would be predicated, I couldn't grant a motion for a directed verdict. That would be a matter that would have to be decided by the jury.

Mr. Irwin: Quite right.

The Court: So why should you direct the motion for a directed verdict as to a portion of the indictment?

Mr. Irwin: I see your Honor's point, and that is what bothered me, and that is the reason I only mentioned that particular part.

The Court: At the close of your own case, ah, that is an entirely different proposition. It might be proper to give the matter very careful consideration then. I think it is covered in your motion, although I didn't think it was necessary.

Mr. Irwin: If I may answer your Honor, or elaborate what I have in mind. I am having in mind that that might [707] be construed that that allegation is one of the elements of the scheme as distinguished from a representation. If that should be the situation and deficient, and if it is an integral part of the scheme, its absence then might be said that the scheme itself fails. That is why I pointed out that particular one.

The Court: I think in all fairness that the same motion on that same ground should, by a stipulation, be deemed to be made as to each and all of the defendants so as to complete the record.

Mr. Campbell: I so stipulate.

Mr. Lawson: That is the point, your Honor, that I had in mind. I wanted to have about five minutes this afternoon to cover it. That is exactly what I had in mind.

The Court: Have we covered that now?

Mr. Lawson: Yes.

The Court: Now, you see, I want you to keep your record clear, as I called attention this morning, in order to protect you on that when all the evidence is in. The picture then may be quite different. I don't know.

Mr. Lawson: I think, your Honor, that the motion as now made is available as to that argument on the state of the record, and I just wanted about five minutes. I think I can state it in that time.

The Court: Is it different?

Mr. Lawson: It isn't the grounds; it is just the statement of the argument. I am not going to elaborate upon it.

The Court: Is there anything else? If I give Mr. Lawson five minutes, I still have two." [708]

* * * * *

"The Court: Go ahead, Mr. Lawson. We will give you five minutes, as requested.

Mr. Lawson: Your Honor, I think we are in entire accord, as I understand your Honor, with this general principle, that it is not necessary for the plaintiff to prove each and every allegation contained in the indictment, but it is equally true that the plaintiff has the burden of proving the charge as alleged substantially. Now, by that, there is no authority that I know of that will permit the plaintiff to compel defendants to go before a jury on a mere frag-

mentary part of their case. The case that they have proven must have been substantially proved, otherwise it would throw the burden on the defendants of going before the jury and establishing their innocence.

Now, there are three elements in this case that address themselves directly to the vital part of this charge, and without that—I might almost say that without one of them, the charge has not been substantially proved. I have searched the record carefully and I know that there is no evidence in this case to show that any of the defendants at any time ever represented to any of the investors that the First Security Company would make loans that were secured by legal investments approved by the State Corporation Department or the Superintendent of Banking.

The Court: Suppose they made the representation: There is no proof in the record that they were false. So whether they made the representations or not might not be material, as there is no proof that that was not true.

Mr. Lawson: Then it must be admitted that there was no such representation, that is, of a false character made with reference to that subject matter.

The Court: It must be proved. Under the present [709] state of the record, there is no proof that that representation was false. I don't know but what they got the consent of the State Corporation Department. I can't take

judicial notice of the State Corporation Department, because they are individualized. I might possibly have to consider as judicial knowledge or common knowledge as to the Superintendent of Banks, because every man who has been in business or in the practice of law knows the type of securities that they approve as legal for savings banks, or for any type of banking, but there is no such common knowledge or judicial knowledge as to the State Corporation Department. So, therefore, there is no evidence in this record as to the falsity of those representations.

Mr. Lawson: Yes, and construing the paragraph as a whole, because the latter part of that paragraph says, 'whereas, in truth and in fact, moneys were diverted to the Investment Finance Company.' That charge is an integral part of the scheme because that is something that just a moment's reflection will show that if the investors were told that they were going to have a company operated on a conservative basis of that kind, and then it wasn't operated on that basis, then, of course, they were deceived in a material respect.

Now, the second point stands out in the same bold relief, and that is as to the question of market price. Now, in Volume 9, just before the testimony of Mr. Bruce, we discussed that matter, and your Honor stated at that time that it would be necessary for the plaintiff to prove

that the defendants did depress market price. The plaintiff took the reverse order of proof. They first proved that the bonds were discounted below par value, which is meaningless, without some relation to the first part of the charge, [710] and that is that the defendants did depress the market prices of the securities.

Now, there is no inhibition on the part of the First Security Company, or any other corporation, to buy those securities if they bought it fairly and paid a market price. I haven't even heard the suggestion in the case where they didn't have that right.

Now, there is no inhibition on the part of the those market prices were depressed and thereby the defendants acquired the bonds at a price less than the market price, that goes right to the very heart of this charge, because so far as the holders of those certificates, if they receive the market price, which they have received, either the market price or a better price, they have not been defrauded.

Now, that includes the holders of preferred, the holders of collateral bonds, the short-term noteholders, and every investor. The evidence is unmistakably to one point, and that is that they received market price or better.

Now, this is what mystifies me: Not only did the plaintiff not introduce any evidence to prove that, but when we sought to go into it they prevented it by objection. Your Honor will remember the testimony of Mrs. Orville Wright

where she referred the matter to her banker, Mr. Richmond, for investigation. Now, we wanted to open that up and show that after an investigation he found out that the prices which were offered by the First Security Company were fair prices and, naturally, we wouldn't have done that unless we knew that it was at least equal to or in excess of market price, and they objected to it.

Now, the same thing was true with the witness Bidleman. He said that he referred the matter to his banker, and after the matter had been referred to his banker he sold, and we [711] must presume that that was at market price.

The other witness in Long Beach testified that he had received cards from other brokers, other concerns, quoting the prices of these securities. Now, when we tried to get into it to find out what they were, they objected, and I must say that it is something that is—it is to say the least strange when the direct allegation is in that indictment, then they prevent us from trying to prove it. There is nothing strange about the meaning of market price, but, your Honor, there is this case that came to me, and I want to call it to your attention. It is really interesting. I will have to run it down. I just got it. I just happened to run into it. As a matter of fact, it is a decision of the Circuit Court of Appeals for the Tenth Circuit,

Walls v. Commissioner of Internal Revenue. The decision was handed down on July 5, 1932. In that decision the court makes this very clear definition of what the term 'market value' means. Of course, market value is synonymous with market price. There are plenty of decisions that I have quoted to your Honor that established that, and your Honor is familiar with it. * * *

Unless the plaintiff can pull a rabbit out of the hat, or if it has some crystal ball that we could gaze into and discover something here wherein market value is established in this case, it must be admitted that there isn't even the slightest suggestion of the proof of market price; and I say to your Honor that that is not merely something that they can discard and say, 'We will move on to something else;' that is the basis for the fraud.

If there has been fraud, it has been buying those securities from the investors under the market price, because if they were paid the market price, they have not been [712] defrauded, and it might even be said in a very general sense of the word, if they received the market price on those securities, and the First Security got the company, it doesn't make any difference what was done with it. They were not defrauded.

Now, the only possible avenue of escape would be that the plaintiff might now say, 'Well, we cannot prove 80 per cent of our case,

the investors, the holders of collateral trust bonds, yet, they were not defrauded, but how about the holders of preferred stock?"

Where is the proof that they have lost anything? There is no evidence in this record that they have. They didn't even introduce a statement of account of the operations of this company. Here the plaintiff has had these books for a year and a half and I thought that we would get at least an audit to show the operations of the company. A company cannot operate without money, and for the determination as to whether or not there is a profit or loss, certainly there should be some sort of a showing to show that the holders of that preferred stock had been defrauded. There is no evidence in this case, your Honor, as to that.

Now, the third, in regard to that other section of the indictment where under the pretense of loans the defendants converted and diverted large sums of money to themselves, in substance that: Where is the proof in this record that any of this money got into the pockets of the defendants?

I certainly hope that the plaintiff would not be so naive to take the position that probably in some of these little minor transactions where one or two of the individuals, individual defendants, say, bought a house or bought a car or something like that for a few dollars, that that is proof to support the charge as maintained in the indictment that [713] they diverted and converted large sums to themselves.

Those were little incidental and trivial matters, which have no bearing at all upon the main charge in this indictment.

There is my position, your Honor. I say that they were not things that are small. It constitutes the entire charge in this case and upon any one of those three we could well ask the plaintiff, not by argument, not by sophistry, but by pointing out to your Honor what is the evidence to support any one of those three.

I think, your Honor, that on a motion of this kind, even before the defendants put on a defense, that this motion should be determined in that light because otherwise, why, we are forced to take the stand and prove our innocence.

The Court: Well, counsel did pretty well. He got through in 15 minutes, anyway.

Mr. Adams: Before we adjourn, may I say one word? To this point I want to adopt everything that Mr. Lawson said except, your Honor, that in our particular case we are not concerned with preferred or common stock. We are accused of depressing bonds only. It is a very specific allegation."

"The Court: * * * I do not interpret this indictment as interpreted by counsel for the defendants. * * *

The indictment says, 'That the defendants did depress and cause to be depressed the market price of said securities.' In other words, by this action, did they cause a situation to prevail where those securities sold for less than

they would have sold had it not been for those actions, that is, sold generally in the market places of this city. That is a question for the jury.

* * * * *

On this question of regard to the Superintendent of the Banks and the Commissioner of Corporations, I have already [714] indicated my view as to the one of two elements which have been called to your attention, but I interpret that section also a little bit differently. ‘That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.’

There is evidence in here as to letters going out concerning that statement, the representation is made there. Whether it is true or false, the representation is there, and this indictment says that the defendants made certain representations, whereas, in truth and in fact, as the defendants knew, large sums of money belonging to the corporation were loaned or diverted to the defendants and to the Investment Finance Company.

I don’t regard the second clause of that indictment as dependent upon the falsity of the first part.

The third point raised—for the minute I have lost it.

Mr. Lawson: The second paragraph from the bottom, page 4.

The Court: Yes. Well, there again that is a matter for the jury to decide.

* * * * *

The motions of all of the defendants for a directed verdict, other than the motion of the defendant Twombly, will be denied. I will pass upon Twombly's at five minutes to 10:00 tomorrow morning, and I will ask the bailiff to have the jury here at 10:00 o'clock and we will proceed.

Mr. Irwin: Before your Honor adjourns, may the record show an exception on behalf of each defendant? [715]

The Court: The record may show that each defendant takes an exception to the ruling on the motions to strike and on the motions for a directed verdict." [716]

Thereupon the following proceedings were had:

"Mr. Irwin: Has your Honor disposed of the Twombly matter?

The Court: Yes.

Mr. Irwin: Might I address the Court.

May it be considered at this time that we are renewing, on behalf of the defendants Starr, Smale and Thomas, the motion for severance, and may the showing your Honor permitted at

the time before, be deemed to have been reiterated and reaffirmed.

The Court: May it be so stipulated as to all defendants?

Mr. Campbell: I will so stipulate.

Mr. Lawson: Yes.

The Court: Motion denied and exception allowed as to all defendants.

Call the jury."

Thereupon the following proceedings were had before the jury.

"Mr. Campbell: * * * I move on behalf of the plaintiff * * * to dismiss count 3 of the indictment." (Thereupon said count 3 was dismissed).

"Mr. Adams: The defendant Twombly will have no evidence to offer. Defendant Twombly renews the motions previously made, and rests.

The Court: Very well.

Mr. Irwin: May it please the Court, the defendants Starr, Smale, and Thomas rest. I have a matter which I wish to direct the Court's attention to, but that should be done outside the presence of the jury.

The Court: Mr. Lawson?

Mr. Lawson: Your Honor, the defendants Edgerton and [717] Ireland rest.

Mr. Butler: The defendant Cronk rests.

The Court: Very well."

Thereupon each of the defendants renewed their respective motions to limit and strike oral and

documentary evidence made at the conclusion of the plaintiff's case in chief. Each of said motions was denied by the court and to said rulings of the court each of the defendants duly excepted.

"The Court: Regardless of that, I am not very interested in technicalities. May it be stipulated that the defendants may renew their same motions for directed verdict?

Mr. Campbell: I will stipulate they may be renewed at this time upon all grounds heretofore stated.

The Court: That will be allowed and deemed to be made. It will not be again copied in the record, but the stipulation is as to each defendant all of the motions as to directed verdict heretofore made at the close of the Government's case may be deemed to have been again made *ceriatum* and denied, and exception allowed."

* * * * *

"Mr. Irwin: I understand your Honor has already ruled on the motions, that there was a ruling on the motion for renewal.

The Court: They are all denied and exceptions allowed. It is in the record." [718]

Thereupon the plaintiff made its opening argument, during the course of which the following occurred.

Mr. Campbell:

"The indictment goes on to say:

"That the defendants did depress and cause to be depressed the market price of the said

securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.'

And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.

Mr. Lawson: I take exception to that remark, your Honor, and assign it as prejudicial error; that the jury be instructed to disregard it. There is no evidence in this case, either as to the actual value or the market prices of the securities.

Mr. Irwin: I join in that exception, your Honor, and I assign it as misconduct.

The Court: Will you read the statement, please?

Mr. Butler: Your Honor, on behalf of the Defendant Cronk and on behalf of the Defendant Twombly I join in that citation of error.

The Court: Read the sentence, please.

(The record referred to was read by the reporter, as follows: [719]

(‘That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.’)

(‘And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.’)

The Court: The objection will be overruled. The jury are instructed that counsel is arguing the evidence as he sees it, and he is simply, in effect, saying to you—and I shall ask him to correct me if I am not stating him correctly—in substance that the various items of evidence, which have been produced before you, indicate that the situation was caused whereby these people intended to be defrauded, and other persons indicated in the indictment, were not able to get as high a price for their securities in the

sale of them as they would have been had it not been for the activities of these various defendants.

Mr. Campbell: Yes, your Honor. I thought in substance I so stated.

Mr. Irwin: Recognizing my responsibility, may I respectfully take exception to the Court's statement? I [720] feel that I should assign the statement as error, if I may, at this time.

The Court: You may.

Mr. Lawson: I will join in that exception, your Honor."

* * * * *

"Mr. Campbell: Gentlemen, I am going to take a short period of your time when we resume again, which I understand will be Tuesday morning. While I want you to understand, as has been told you from time to time throughout this case, that the plaintiff believes that in fairness to these defendants you should not make up your minds in this case until you have heard all of the arguments, until you have heard the instructions of the Court, and the matter has been submitted to you; nevertheless, it is entirely proper, I believe, for you to consider these facts to yourself, that have been produced here in evidence before you, and I hope that each one of you, during this weekend, if you have the opportunity and the time to do so, will think over to yourself the matters which I have called to your attention today: Matters which are here in the evidence of this

court, matters which stand on the record of this court; and, particularly, those matters in which there has been no contrary proof.

Mr. Irwin: If your Honor please, I wish to assign that last statement of counsel, directed to the jury, as prejudicial misconduct.

Mr. Lawson: I will join in that, your Honor.

The Court: Assignment denied; exception allowed." [721]

Thereafter the following occurred during the course of plaintiff's closing argument:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wished.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now, the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is located, or you may want to branch out [722] and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business.'

That is the purpose and object of my company, and that is what we are going to do with the money.'

So you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel, and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no,' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes, to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct [723] the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, your Honor—

The Court: And it has been relied upon in argument of nearly all of defendants' counsel in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan.

Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell's (Plaintiff's Exhibit 46) and in his reference to it he says this: 'There is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed

on this document, that the document itself is not to be considered by you as proving or [724] disproving any of the facts or statements—strike out the ‘facts’—any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere, to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see. Mr. Campbell starts out to say here, and he propounds certain questions—

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up.

Now am I right or am I wrong.

Mr. Campbell: No, you did not, Mr. Lawson.

The Court: I remember you making the statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

‘Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there

is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.

Now, to me, it is sort of a bit of sophistry, shall I call it, [725] to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his statement. Now may I proceed, your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made

on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now Mr. Campbell proposes to show the jury that there is something in the record to substantiate at least some of the charges, and I see no impropriety in it. [726]

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

"Now, that brings us to a couple of documents that are in evidence. Gentlemen of the

jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you would honestly and sincerely respect the limitation and the instructions of the Court with reference to those documents, because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made."

Now you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean [727] Campbell.

Mr. Lawson: That would seem to follow, your Honor—I agree that that is true,—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose an objection to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your [728] minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these

statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception as to that?

Mr. Lawson: Yes, your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are there made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court

please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report. [729]

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen, I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it:

'Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see Schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance

Co., to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation."

Now, referring to that document, Mr. Lawson has said:

'I have shown you that there is no evidence [730] in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct violation of your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, your Honor.

The Court: The exception will be disallowed.

INSTRUCTIONS TO THE JURY

The Court: Gentlemen of the jury, it now becomes my privilege and obligation to instruct you as to the law involved in this case. Under the Federal practice, the judge is permitted to comment on the facts of the case. You must understand, however, that such comments are mere matters of opinion which you, the jury, may disregard, if such comments conflict with your own conclusions. The reason for this is that the jurors are the sole and exclusive judges of the facts. I shall leave the determination of the facts in this case to you; being satisfied, as I am, that you are fully capable of determining them without any particular comment from me. Where I have at any time during the trial interrupted a witness or an attorney or have made a voluntary statement, indicating that there seemed to be some confusion or some contradiction or lack of clarity in the testimony being received, I have done so only to permit a witness to straighten out the matter; and you are not to infer from any such interruption or statement that I have doubted the truth or accuracy of the witness' testimony. It has been my purpose merely to be sure, and to have you be sure, of the testimony. Whenever I have attempted, and whenever I may in these instructions attempt, to recite or to summarize or to state what a witness has said, I am only giving my recollection of the testimony and, insofar as my recollection does not accord with yours, you must act upon your own recollection and not upon the Court's.

However, it is the exclusive province of the judge to instruct you as to the law applicable to the case, in order that you may render a general verdict upon the facts as the same are found by you and upon the law as given to you by me in these instructions. It would be a violation of your duty [732] for you to attempt to determine the law or to base a verdict upon any other view or interpretation of the law than that given you by the Court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the Court and all higher tribunals that you have acted in accordance with the Court's instructions, and you have been sworn so to do.

One of the most fundamental principles of the American judicial system is that persons are equal before the law, and no one is above the law. You should bear this in mind, when applying the legal principles enunciated in these instructions, in determining the guilt or innocence of any defendant or defendants on trial. You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment, as limited by the bill of particulars insofar as the defendant Twombly is concerned, and the plea of the defendants to the indictment.

Repetition, if it occurs—and I am satisfied that it will occur because the instructions prepared by me will be supplemented by suggestions from plaintiff and defendants' counsel—does not indicate that any one matter is of greater importance than another. All rejected instructions or all requested

instructions and all objections to proposed instructions which have not been presented in a timely manner and in the form, with citations of authority, as prescribed by law or by the rules or the order of the Court, are hereby rejected.

You should not consider as evidence any argument, statement or comment or attempted legal interpretation made by counsel during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts. [733] Such statements, arguments, comments or suggestions are not evidence and must not be considered as such by you. You must not consider, for any purpose, any evidence offered and rejected, or which has been stricken out by the Court; such evidence is to be treated as though you had never heard it. You are to consider evidence, which has been limited in scope or application by order of the Court, only for the particular or limited purpose for which it was admitted by the Court. You are to decide this case solely upon the evidence which has been introduced before you and the inferences which you may deduce therefrom as indicated in these instructions, and upon the law as given you in these instructions.

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible, but, on the contrary, the law requires the plaintiff to establish his guilt by legal evidence beyond a reasonable doubt.

The presumption of innocence goes with each defendant throughout the whole trial, even till the verdict is rendered, and this presumption of innocence outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof beyond a reasonable doubt.

You are instructed that the presumption of innocence, with which each defendant is at all times clothed, is not a mere form to be disregarded by you at your pleasure, but that it is an essential, substantial part of the law and binding upon you in this case, and it is your duty to give the defendants the full benefit of this presumption, and to acquit these defendants, and each of them, unless the evidence in the case convinces you of their guilt as charged beyond all reasonable doubt.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an [734] impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the plaintiff to convince you of the truth of the charge, you can candidly say that you are not satisfied of a defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt you are not to understand that all doubt is to be excluded; it is impos-

sible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility of error, but so as to exclude reasonable doubt.

When, after weighing all the evidence, you have an abiding conviction and belief that a defendant is guilty, it is your duty to convict, and no sympathy justifies you in seeking for any doubts by any strained or unreasonable construction or interpretation of evidence or facts.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on mortal evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Now in judging of the evidence, you are to give it a [735] reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with

a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are instructed that if there are any matters of fact which are left unanswered by the evidence, they cannot be made certain to the prejudice of any defendant by inference. In the absence of evidence, no inference can be drawn by the jury against any defendant; but on the contrary, all the inferences and presumptions consistent with the fact proved are to be drawn in favor of innocence. No fact or circumstance upon which you may base a conclusion of guilt is sufficient, unless such fact or circumstance has been proved beyond a reasonable doubt and to the same extent as though the whole conclusion depended upon one fact or circumstance.

You are the sole judges of the credibility and the weight which is to be given to the witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should [736] carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his

demeanor, his manner while on the stand, his intelligence, the relations which he bears to the plaintiff or to a defendant, the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony. You must understand that you are governed by the answers only and not by any inference from the questions which may have been propounded.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men.

Now there is nothing peculiarly different in the way a juror is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains

the plaintiff is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected [737] to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

Before you would be justified in convicting the defendants, or any of them, the facts or circumstances must not only be entirely consistent with the theory of guilt, but must be inconsistent with any other rational conclusion, and if two opposing conclusions can with equal propriety be drawn from the evidence, one consistent with guilt, the other consistent with innocence, the latter should be adopted, and you should acquit the defendants, and if you have any reasonable doubt as to which of the two opposing results a chain of circumstances leads, then if one of those results is reasonably consistent with the defendant's innocence, your verdict should be not guilty.

Your personal opinion as to facts not proved cannot in any manner be considered or used by you as the basis of your verdict. As jurors, you can only act upon the evidence introduced upon this trial and, from that evidence and under the instruction of the Court, you must form your verdict unaided, unassisted and uninfluenced by any opinion or belief that you may have which is not based upon that testimony.

You are instructed that the defendants are on trial for the crimes charged in the indictment, as I have previously indicated, and for no others.

In determining the guilt or innocence of each defendant, you must weigh the evidence as against that defendant carefully and must have clearly in mind those portions of the testimony which directly connect that defendant with the commission of the offense complained of. Unless you are able to say that the evidence directly connecting such defendant with such offense demonstrates beyond a reasonable [738] doubt that such defendant committed such offense, then you are bound under your oaths to find such defendant not guilty.

A reasonable doubt which justifies the acquittal of the defendants need not be established affirmatively by the evidence in the case. The true rule is that the defendants should be acquitted unless it clearly appears that a reasonable doubt has been affirmatively excluded by the evidence introduced. A reasonable doubt may arise from the want of evidence as well as from the evidence; and a reasonable doubt may arise also from the nature and character of the evidence introduced, if the minds of the jurors are not convinced, because of the nature and character of the evidence, of the truth of the allegations required to be proved in order to warrant a conviction.

Each defendant in this case is entitled to the independent judgment of each and every jurymen who has been selected to try the defendants. Twelve men constitute a jury under the law, and no man may be convicted of an offense unless the judgment of each and all of said twelve men shall concur in the conviction, unless by a stipulation

there has been an agreement that less than twelve may arrive at a verdict, which is the case here. It has been stipulated that eleven of you will act just as though twelve had been on the jury panel, and you must concur unanimously in your verdict as to each defendant.

A plea of not guilty is a denial of each and every fact alleged in the indictment. The law does not require of the defendant to take the stand, or to produce evidence to support his denial. Each defendant may rely upon his denial and the presumption of innocence, and it then becomes the burden of the plaintiff, as I have heretofore explained to you, to [739] satisfy you by evidence of the defendant's guilt beyond a reasonable doubt.

Now, gentlemen, there are two kinds or classes of evidence recognized and admitted in courts of justice, particularly in the federal courts, upon either of which jurors may return a verdict. One is known as direct evidence.

Direct evidence is that which proves the fact in dispute directly, without any inference or presumption, and which in itself, if true, conclusively establishes that fact. The testimony of eye witnesses to the commission of an offense is evidence of this character.

The other class of evidence, that is, indirect evidence, is what is quite frequently referred to as circumstantial evidence.

Indirect evidence, or circumstantial evidence, is that which tends to establish the fact in dispute by proving another and which, though true, does not

of itself conclusively establish that fact but which affords an inference of its existence. Such evidence may consist of statements made by a defendant, plans laid for the commission of a crime—in short, any acts, declarations or circumstances admitted in evidence tending to establish the offense charged and to connect the defendant with its commission. For example, a witness testifies to an admission of a party to a fact in dispute. This tends to prove a fact from which the fact in dispute may be inferred.

Now, to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances taken together must be [740] of a conclusive nature, leading on the whole to a satisfactory conclusion and producing a reasonable and moral certainty that the accused committed the offense charged.

If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence, or by a combination of both; and so also a conviction upon circumstantial evidence would not be authorized if the proof were less satisfactory to the minds of the jury than it would be by direct evidence. The law makes no

distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

While you may show what a man does by direct evidence of eye witnesses, the only way you can show what he intends and believes or what his plans are or what he has devised or what his purpose is or was, is by circumstantial evidence, ordinarily. The indictment charges that the defendants had devised a described scheme for obtaining money and property by means of false and fraudulent representations, pretenses and promises. Such a fraudulent scheme can only be found by a jury, ordinarily, by circumstantial evidence. And all of these instructions, as to circumstantial evidence, have equal application to each of the counts of the indictment, including the conspiracy count, which will be particularly discussed later.

Now unless otherwise indicated or directed by the Court, you will apply the instructions of the Court to the case of each separate defendant, regardless of whether the separate [741] names are expressed therein.

There are certain general statements which I wish to make to you, gentlemen of the jury, with regard to some of these matters which have been discussed in the testimony or in the argument of counsel. You must understand, of course, that an act innocuous in itself and perfectly legal may become illegal be-

cause it is tainted with some type of fraud or misrepresentation.

Now the acts and dealings of a corporation, as indicated in its books and records, are presumed to be legal. A California corporation has a right to buy at a discount bonds previously issued by it, provided, of course, as I have said, there is no fraud involved in the transaction. Generally speaking, a corporation also has the right, subject to substantially the same limitation, to buy its capital stock. A corporation is an entity distinct from its stockholders. The stockholders have no estate in the assets of the corporation. Those assets are owned by the corporation. The par value of a corporation's shares is merely the value per share indicated on the face of the stock certificate, as provided in its articles of incorporation, and this par value is not a true indication of the actual value of the shares. Actual value, for all practical purposes, is the price at which the assets of the corporation might be sold, without forcing, less the cost of selling and less corporate obligations or liabilities other than capital stock liability. Book value of capital stock merely expresses the net asset value of the shares as carried on the books of the corporation.

The market value of an article or piece of property is usually considered to be the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a [742] sale forced by the necessities of the owner, but such a

sale as would be fixed by negotiation and mutual agreement after ample time to find a purchaser as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy, but is not compelled to take the particular article or piece of property. That well-recognized definition is, I think, equally applicable to shares of stock. Many times, however, shares of stock are of such a character that they are freely dealt in on one of our exchanges, or what we call stock markets. Then the price at which the stock is being currently and openly sold is usually considered to indicate the market value. So we may say that market price would be the actual price at which shares are currently sold, or have recently been sold, in an open market, not forced, but in the usual and ordinary course of trade and competition between sellers and buyers equally free to bargain, as established by records of current sales. Shares of stock or any other property may have, of course, a speculative value, which is a value dependent upon future contingencies. These same definitions would apply to bonds or other articles of value, as well as stocks.

The holder of a secured bond is a secured creditor of the corporation which issues the bonds. The holder of an unsecured bond, sometimes called a debenture, is an unsecured creditor. Corporations are ordinarily controlled by ownership of shares or by the holding and presentation of proxies to vote those shares issued by the registered owners thereof, or by both. The power of directors must be exercised for the benefit of the shareholders, and not

for the benefit of the directors or of the promoters or of some favored few. Directors are fiduciaries, but are not, strictly, trustees. The fiduciary duty, however, is not relaxed to the extent that a [743] director may obtain any unfair advantage or profit for himself by misrepresentation, concealment, or by any type of fraud. Dealings between corporations having directors in common are not presumptively illegal. Illegality depends upon what was done and how it was done; whether or not there was fraud in the transaction. The same thing is ordinarily true in dealings between a director and an officer or directors and officers and its corporation or its shareholders or bondholders. The transaction may be entirely legal or if there be fraud involved then it may be illegal.

There is no legal presumption that an officer, director, stockholder or manager of a corporation is fully informed as to, or even familiar with, the entries in books of account were kept under his instruction, direction or supervision. You may, however, find from the evidence that any such person had, in fact, knowledge of certain entries in the books of account. The fact that Mr. Twombly was working on the books of a corporation as an auditor does not, in itself, prove that he was familiar with all or any particular entries therein.

A director or other officer of a corporation has a legal right to rely upon the correctness of any audit

report, financial statement or report of similar character, provided he, in good faith, so relies.

Books and records which were properly admitted into evidence and were clearly applicable to the case of one defendant must actually be connected with the other defendants in some sufficient manner or through a finding that the other defendants were co-conspirators with such defendant, before books and records could properly be applicable to the remaining defendants and their causes. [744]

You are instructed that a large number, not all, of the bonds issued by the First Security Deposit Corporation matured on November 1, 1942, and that under the trust indenture issued in connection therewith, the date of payment of these bonds might be deferred for an additional period of 22 months under certain conditions and with certain results as indicated in that trust indenture.

The common shares of the First Security Deposit Corporation were issued as shares having no par value. However, if I remember the testimony correctly, an arbitrary value was given by a vote of the directors to the shares of \$5.00, \$1.00 being charged to capital and \$4.00 set up as capital surplus.

Now, gentlemen, as I have said, the defendants are not on trial for any offense not charged in the indictment, and let us first look at the charges. Most, if not all, of the paragraphs and phrases of the indictment have been heretofore read to you or discussed before you and, inasmuch as the in-

dictment will be sent to the jury room with you, by consent of all defendants and counsel, I shall not attempt other than a general summary of the charges except in special instances.

May it be stipulated that a copy of the indictment may be given to the bailiff to take to the jury room?

Mr. Lawson: So stipulated.

Mr. Butler: So stipulated.

Mr. Campbell: So stipulated.

Mr. Irwin: So stipulated.

Mr. Adams: So stipulated.

The Court: That will save us a lot of time.

Now count 3 of the indictment has been dismissed by the plaintiff and you are to ignore it.

Without going into detail, but for reasons which the [745] Court deems sufficient, I hereby direct you to bring in a verdict of not guilty as to each and all of the defendants upon Count 10 of the indictment.

The motion to strike Exhibit 155, being sometimes referred to as the count letter in Count 10 of the indictment, is granted insofar as concerns all of the defendants except the defendant Twombly. You are instructed that your consideration of the guilt or innocence of any of the defendants other than the defendant Twombly must be predicated upon other evidence and this letter must be entirely disregarded.

Now as to the defendant Twombly, you must first consider whether or not that letter is signed by him, and in that connection you may examine other

admitted signatures in the record. If you should determine that the signature is not that of the defendant Twombly, you must entirely reject Exhibit 155 as an item of evidence. If, however, you determine that the signature is genuine, then, and only then, you may consider that letter as evidence, but, even then, only as an item in determining the intent of the defendant Twombly. I have already limited in like manner other items of evidence and I feel sure no further instructions are necessary as to this limitation.

I instruct the Clerk to hand to the bailiff that letter to take with you in order that you may consider it.

Now Counts 1 and 2 and Counts 4, 5, 6, 7, 8, 9, Counts 11, 12, 13, and 14, are what we shall hereafter refer to, for convenience, as the substantive counts or the mail fraud counts. I sometimes may carelessly say 'the first 14 counts.' If I say 'the first 14 counts' I mean with counts 3 and 10 omitted.

Count 15 is what we shall, for convenience, describe as the conspiracy count. All of the general instructions which [746] I have heretofore given you are applicable to and should be considered by you in connection with each and every count of the indictment.

Now I want to explain to you that under our system of jurisprudence a defendant has a right to come into court and say, 'I don't think this indictment particularizes enough so that I know just

what I am charged with, and I want the plaintiff to tell me with particularity what I am charged with.'

A hearing on the requests of the defendant is had in court, and was had in this case as to the defendant Twombly. The Court listens to the presentation of the matter and he finally decided, in this case, as is customary, that certain matters were not sufficiently carefully described in the indictment as to the defendant Twombly and required the plaintiff to furnish to him and file in this court what we call a bill of particulars.

Now there is nothing esoteric about any of these proceedings and the effect of this bill of particulars is to limit the plaintiff insofar as the charges in the indictment are concerned by the statements in the bill of particulars. The bill of particulars can't expand the indictment but it can and does limit it.

Now I think before we proceed further we ought to run over some of these items in the bill of particulars.

Now there was a request made, which we will describe, for convenience, as request 1, by the defendant Twombly through his counsel, and in ruling upon that request the Court said:

'Defendant Twombly is entitled to know what acts of his occurring subsequent to his disassociation with the corporations involved the plaintiff [747] contends are criminally chargeable against him under the indictment.'

Now that is acts subsequent to his disassociation. The plaintiff answered that in this way:

'The plaintiff does not contend that the defendant Twombly is chargeable with any criminal acts as set forth in the indictment after he severed his connection with the corporations referred to in the indictment on or about December 21, 1938.'

Now during the progress of this trial there have been proper objections made to the introduction of evidence by Mr. Twombly's counsel on the ground that they were not applicable to or binding upon him under the indictment as limited by this bill of particulars, and those requests have been granted. I can't go through several weeks of testimony and pick out every little item of testimony that had to do with acts or declarations subsequent to the 21st day of December, 1938, and I shan't attempt to; all I say is that if, by any chance, any of that got into evidence, disregard it. Take it out of your minds. The defendant Twombly is not charged by the plaintiff with responsibility for any criminal acts of any of the defendants after that date.

Now the next request granted by the Court was in this form:

'The defendant Twombly is also entitled to know what acts of the other defendants constituting part of the scheme to defraud which took place prior to Twombly's association with them are criminally chargeable against him.'

The answer to that is as follows:

'The plaintiff states that on or about [748] September 19, 1932, application was made by

First Security Deposit Corporation to the Commissioner of Corporations of the State of California for permission to issue bonds and stock of the said First Security Deposit Corporation and in connection therewith stated in substance that money of the First Security Deposit Corporation would only be loaned or advanced upon security or properties * * *

I shall disregard the balance as surplusage.

'The said application was signed by the defendant R. W. Starr. This representation was made to all of the certificate holders of the Railway Mutual Building and Loan Association who subsequently became bondholders and stockholders of the First Security Deposit Corporation.'

The third:

'The approximate dates within which it is claimed the defendant Twombly was associated in the wrongdoing should be indicated.'

The answer to that by the plaintiff was:

'The defendant Twombly became general manager of the First Security Deposit Corporation on or about November 1, 1934, and severed his connection with the said corporation on or about December 21, 1938.'

The next request was in connection with the allegation in the indictment:

'That at all times from and after the dates of organization of such First Security Mort-

gage Corporation, First Security Deposit Corporation, [749] R. F. D. Discount Company, Inc., Consolidated Investors, and Investment Finance Company, the defendants obtained, maintained, and exercised complete control thereof:

The Court ruled that the manner by which the plaintiff contends the defendant Twombly joined with the other defendants in securing and exercising control of the corporations or any of them referred to in the indictment is as follows:

'As to First Security Deposit Corporation, the defendant Twombly was general manager from on or about November 1, 1934, to on or about September 21, 1938. He was also secretary of the First Security Deposit Corporation from on or about November 21, 1934, to on or about September 21, 1938. He was also a director of said corporation from on or about December 1, 1934, to on or about December 21, 1938. He was also a member of the executive committee of the said corporation from on or about February 19, 1936, to on or about September 1, 1938.

As to the Investment Finance Company, he was secretary from on or about September 5, 1935, to on or about September 21, 1938. He was treasurer from on or about September 5, 1935, to on or about March 7, 1939. He was general manager to on or about September 21, 1938. He was a member of the board of di-

rectors from on or about September 5, 1935, to on or about December 21, 1938.

The plaintiff does not contend that the defendant Twombly exercised control over either First Security Mortgage Corporation, R. F. D. [750] Discount Company, Inc., or Consolidated Investors.' Then the plaintiff, in answer to request, states:

'* * * as of August 18, 1937, the defendant Twombly owned 260 shares of stock of Investment Finance Company. The defendant Twombly acquired 10 shares on or about October 5, 1935, for which he paid \$10 a share. He acquired 10 shares on July 6, 1936, for which he paid \$10 a share. He acquired 240 shares on December 30, 1936, for which he paid \$240 in cash.'

Now I have waited to explain to you until after I had indicated what was in this bill of particulars that you weren't to consider these statements by the plaintiff as evidence or as proof in any way of the correctness of those allegations. These statements in the bill of particulars simply limit what is charged in the indictment and they are no more proof than the charges in the indictment itself. The only thing they do is limit it.

Then it says:

'That thereafter and for the purpose of and pursuant to the said scheme and artifice to defraud the said persons intended to be defrauded, and on or about the 28th day of De-

cember, 1936, the said defendants sold and caused to be sold the assets of the said Consolidated Investors to the said Investment Finance Company;'

And I ruled that they were entitled to know in what manner those assets were sold by Twombly, either by him or in association with others.

The answer is:

'The plaintiff states that with reference to (that) item that on or about November 9, 1936, [751] defendants R. W. Starr, J. Howard Edgerton, E. C. Thomas, C. W. Twombly, and J. L. Smale attended a meeting of the board of directors of the Investment Finance Company, at which time the following resolution was adopted.'

This I shan't read to you because you will have the minute book before you.

Then the Court ruled that the defendant Twombly was entitled to be told the method by which the plaintiff contends he joined with other defendants in securing and exercising control over those corporations, and the plaintiff stated that:

"* * * it contends the defendant Twombly joined with other defendants in securing and exercising control of the corporations or any of them referred to in the indictment as follows:

As to First Security Deposit Corporation, the defendant Twombly was general manager from on or about November 1, 1934, to on or

about September 21, 1938. He was also secretary of the First Security Deposit Corporation from on or about November 21, 1934, to on or about September 21, 1938. He was also a director of said corporation from on or about December 1, 1934, to on or about December 21, 1938. He was a member of the executive committee of the said corporation from on or about February 19, 1936, to on or about September 21, 1938.

As to the Investment Finance Company he was secretary from on or about September 5, 1935, to on or about September 21, 1938. He [752] was treasurer from on or about September 5, 1935, to on or about March 7, 1939. He was general manager to on or about September 21, 1938. He was a member of the board of directors from on or about September 5, 1935, to on or about December 21, 1938.'

Then there is a charge in the indictment:

'That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the grand jurors unknown, and with funds which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded;'

I ruled that the defendant Twombly in that connection was entitled to know how and in what way it was contended that he alone had jointly with the others caused to be depressed any of the securities of the First Security Deposit Corporation, the names of the agents who participated and the actual value of the securities depressed, the amounts withheld, the disclosure of the method by which it was contended Twombly employed to divert the funds to his own use.

Now the plaintiff stated, with reference to that—they referred to the letter to Bidleman, set forth in Count 1 of the indictment, the letter to Benn in count 2, the letter to Morse in count 4, the letter to Winston in count 5, to Taylor in count 6, the letter to Kate Orwall in count 7, the letter [753] to Morse in count 8, the letter to Bidleman in count 9, the letter to Benn under date of October 24, 1938, in count 11, the letter to Morse in count 12, the letter to Taylor in count 13, the letter to Mrs. Talamantes in count 14, the letter to Dennis Taylor, which is overt act 25 of count 15, the check to Mary Wiseley, which is overt act 27 of count 15, a check to Hicks which is overt act 30 of count 15, a check to Kidder which is overt act 37 in count 15, a telegram to Bidleman which is overt act 38 of count 15, letter of March 30, 1937, addressed to Grace Bidleman or Leland H. Bidleman, letter of December 5, 1936, addressed to Hattie R. Geddes, letter of October 8, 1937, addressed to Fred O. Morse, letter of November 1, 1937, addressed to Morse, letter of December 31, 1937, addressed to Morse, letter of

April 19, 1938, addressed to Morse, letter of October 11, 1937, addressed to Mrs. Wright, letter of November 29, 1937, addressed to Mrs. Wright, letter of May 16, 1938, addressed to Mrs. Orwall, letter of July 17, 1937, received by Hattie R. Geddes for the estate of Guy E. Smith.

'That in depressing and attempting to depress the market price of securities of the First Security Deposit Corporation the following corporations and individuals were used:

Charles Lee Cronk,
Investment Finance Company,
Battelle, Dwyer & Company,
Seaboard National Bank, Wilshire and La Brea Branch,
Bank of America, Dunsmuir and Wilshire Branch.

The actual value of the bonds'—

I call your attention to that word 'depressed was the face value of the bonds plus interest accrued to date of ac- [754] quisition by Investment Finance Company. With reference to the value of the bonds depressed the approximate actual value was \$267,453.65 and the amount withheld was approximately \$97,628.66.'

Now, gentlemen, by their limiting their charges in the bill of particulars to the value of bonds depressed, you are to consider that there is no charge under that clause of the indictment of depressing the market as to any other security than bonds, so far as the defendant Twombly is concerned.

He goes on to say:

'That the defendant Twombly having been an officer and director of certain of the corporations mentioned aided in bringing about the loans from First Security Deposit Corporation to Investment Finance Company of great sums of money; that as an officer of Investment Finance Company he aided in bringing about the acquisition of the assets of Consolidated Investors by Investment Finance Company; that he was the owner of 260 shares of stock of Investment Finance Company; that during the time that he was either general manager, director, or officer of the First Security Deposit Corporation or Investment Finance Company he took part in the transactions between the First Security Deposit Corporation and Investment Finance Company wherein large sums of money borrowed from First Security Deposit Corporation by Investment Finance Company were invested in private enterprises in which he was personally interested.'

Then in connection with that count of the indictment which he said: [755]

'That the defendants, under the pretense of loans, and by divers other ways to the grand jurors unknown, did convert and divert to their own use, benefit and profit large sums of money and property of the said First Security Deposit Corporation and of the persons intended to be defrauded;'

The Court stated that the plaintiff should state what were the divers other ways by which the defendant Twombly did these acts, either alone or with others.

The answer is:

' * * * that the divers other ways in which defendant Twombly converted money or property of the First Security Deposit Corporation consisted of the transfer of approximately seven pieces of real estate to the Investment Finance Company between the dates of June 15, 1936, and January 7, 1937, in exchange for collateral trust bonds of the First Security Deposit Corporation, which real estate was subsequently sold at a profit by the Investment Finance Company. Between the dates of November 1, 1938, and March 24, 1939, approximately 37 first trust deeds were transferred from the First Security Deposit Corporation to the Investment Finance Company in exchange for collateral trust bonds of the First Security Deposit Corporation, plus accrued interest, which deeds were subsequently sold by the Investment Finance Company at face value, Investment Finance Company thus realizing a profit in the transaction over the cost of the bonds to the Investment Finance Company.'

Then in connection with the allegation: [756]

'That * * * said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of the said assets received by it from the Railway

Mutual Building and Loan Association; whereas in truth and in fact the defendants, and each of them, then and there well knew that no such liquidation was in fact being carried into effect * * * ,

The Court indicated that the plaintiff should state how, upon what date, in what manner, the defendant Twombly represented and pretended that this liquidation was taking place.

In answer to that the plaintiff refers to counts 1 and 9 of the indictment and overt acts of count 15 of the indictment numbers 20 and 25, and sets forth the letters which are there indicated. And then states:

'The plaintiff will refer to approximately 36 letters, written at Los Angeles and addressed to the following persons upon the following dates, the representations contained therein being the same as in the letters referred to in overt act No. 25 of Count 15 of the indictment, said overt act being a letter dated January 26, 1938, addressed to Mr. Dennis S. Taylor * * * ' with the exception of the name of the person or persons addressed, the date of January 26, 1938, and amount of the securities involved and the amount that they were offered for same:'

Then follows a long list of names of letters, the only material ones of which have been introduced in evidence here and are already before you for consideration.

I have already told you that I would strike out a

certain [757] portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:

‘ * * * therefore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California * * * ’

I shall refer to that later. But I held that the plaintiff should state when, if at any time, the defendant Twombly had any knowledge concerning any requirement, if any, for such types of investment and furnish the same information as regards the other defendants and each of them.

I granted the request as to Twombly and the bill of particulars states:

‘ * * * that the defendants R. W. Starr, E. C. Thomas, R. L. Smale, and A. R. Ireland were officers or directors of First Security Deposit Corporation at the time application was made to the Commissioner of Corporations of the State of California for permit to issue bonds and stock of First Security Deposit Corporation; that the application was signed by defendant R. W. Starr as president of the corporation and filed on or about September 19, 1932. Each of the certificate holders of Railway Mutual Building and Loan Association who converted his or her certificates or shares into stocks and bonds of First Security Deposit Corporation signed a pledge and agreement for reorganization of Railway Mutual Building and Loan Association. As

a part of the application the manner in which the funds of First Security Deposit Corporation would be loaned or advanced [758] was set forth. The defendant Edgerton became attorney for First Security Deposit Corporation in March of 1933; that defendant Edgerton attended a meeting of the board of directors of Railway Mutual Building and Loan Association on September 25, 1933, at which time and place the plan and agreement for reorganization of the Railway Mutual Building and Loan Association was approved.'

Then in connection with the paragraph in the indictment with regard to representations, I directed the plaintiff to state what representations, pretenses, and promises were made by the defendant Twombly, to what specific person and upon what specific dates, and the plaintiff states as follows:

'The plaintiff states with reference to (this) item that the defendant Twombly made the representations, pretenses, and promises set forth in * * * a letter to Grace Bidleman or Leland H. Bidleman * * * ; a letter dated December 5, 1936, to Hattie R. Geddes * * * , copies of which letters are attached hereto and made a part of this bill.'

And which have been introduced in evidence.

That in addition to the representations appearing on the face of the letters to which reference was had above, it is the position of the plaintiff that the defendant Twombly by and through the other defend-

ants herein made all of the representations as set forth in the indictment herein continuously between the dates of on or about September 19, 1932, and December 21, 1938, to the persons named in the indictment as those persons to be defrauded both by means of letters, advertisements, and oral statements; that the defendant Twombly orally represented in substance to Hattie R. Geddes at Los [759] Angeles, California, during November 1937 that the offer of 70 per cent for her bonds would not be good for long; that the First Security Deposit Corporation was going into other hands; that any offer for her bonds made later would not be as good as this one; that the First Security Deposit Corporation was waiting word from the Building and Loan Commissioner which would adversely affect the company; that he was offering absolutely the best price he could; that he could not make any offer of cash at a later date.

Now, gentlemen, I want again to caution you that these allegations in this bill of particulars are no more proof than allegations in the indictment; they are just meant by way of limitation and I have felt that I should indicate what those were.

The mail fraud counts, being counts 1 to 14 of the indictment, excluding 3 and 10, accuse the defendants of using the United States mails in execution of a scheme to defraud, which scheme, it is alleged, they had devised in violation of the United States statute (18 USC, Sec. 338) which provides (and I am paraphrasing the section for brevity) that 'whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or prop-

erty by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any persons residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, [760] whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be punished' as indicated in the section.

Section 550 of 18 USC provides:

'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.'

You will note the words, in Section 338, 'any scheme or artifice to defraud.' It is not necessary to the offense charged in these counts that anyone be actually defrauded, that is, it is not necessary to such offense that the scheme to defraud be successfully executed. The expression used in the statute, 'devise any scheme or artifice to defraud,' is about as plain

as it can be made. 'Devise' means to form or contrive. A man devises a scheme when he forms a plan. He devises an artifice when he forms a crafty, tricky, plan. A man who adopts, and makes his own, a scheme or artifice to defraud, devised by others within the meaning of the law, thereby himself devised such scheme or artifice. In each count of the indictment the defendants are alleged to have knowingly and willfully done the acts and things of which they are accused. As so used, the word 'willfully' means with an evil intent or purpose. Such evil intent or purpose is an essential element of the offenses of which the defendants are accused.

The statute is aimed at every scheme and artifice which [761] is in fact designed to defraud, provided it involves some element of trickery or deceit. No matter how seemingly fair and honest a scheme may appear, it is within the statute if the intent and purpose is to deceive and defraud the unwary. That a scheme would not deceive one of ordinary intelligence or that those intended to be deceived were particularly gullible, does not relieve the promoter thereof from responsibility, the statute being intended for the protection of the ignorant, unwary, and credulous as well as others. The statutory scheme may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of what they are to receive in exchange.

A statement or representation may be false and untrue in fact without being fraudulent, as where it is made in good faith or through honest mistake.

To be false and fraudulent within the meaning of the statute, it must be put forth with intent to deceive, and either with knowledge of its falsity or with such reckless disregard to its truth as may be regarded as equivalent to knowledge. Fraud and deception, within the meaning of this statute, may be by means of implications reasonably derived from representations as well as by express words, and may result from the use of statements not technically false, or, even, under certain circumstances, literally true, where there is present the intent to deceive.

The statute requires that the intent and scheme to defraud shall exist at the time the mails are used. Generally speaking, then, we may say that to devise a scheme or artifice to defraud is to form a plan, device or trick to perpetrate a fraud upon another or others, and the devising of it continues as long as the scheme is in process of execution. It is not necessary that the accused be the inventor or originator of the scheme or artifice or that, when the artifice was devised, the schemer should have worked out all the details of its execution. The crime is complete when the scheme to defraud is devised and the mails are used in an attempt to execute it, and in that connection I am referring only to the mail fraud counts. All I have said and all the other general instructions which I have heretofore given you are applicable to the conspiracy count as well as to the mail fraud counts, but the conspiracy count, as I have already said, will be the subject of further particular instructions before I have completed.

The statute defines three ways in which the use of

the mails in execution or attempted execution of any fraudulent scheme to obtain money or property violates the statute: (a) By placing or causing to be placed a letter or other communication in a post office, to be sent and delivered by the Post Office Establishment of the United States; (b) by taking or receiving any such therefrom; and (c) by causing a letter or other communication to be delivered by mail according to the direction thereon, etc. So far as these mail fraud counts are concerned, the use that is made of the mails may be unpremeditated and purely incidental; the communication may be between schemer and victim—I just call them that without prejudice—but it is not necessary that it shall be; it may be between the schemer and his agent or between the schemer and third parties. The communication used must be a step in the execution or attempted execution of the scheme devised; it is the purpose, inspiring the use of the mails, that brings the scheme-deviser under the law. If he thinks that the use which is made of the mails may assist in carrying the scheme into effect, the offense is committed, whether it actually is effective or not. [763]

It is not necessary to prove that an offense was committed upon the day alleged in the indictment. The general instruction which I have given you as to the burden upon the prosecution in connection with every material allegation of a particular count does not mean that, by the described scheme to defraud, alleged or referred to in the mail fraud counts, it was planned by a defendant that all of the false representations, pretenses and promises therein de-

scribed were to be employed, but you do have to be convinced by the evidence beyond a reasonable doubt, before you can lawfully return a verdict of guilty thereon, that such defendant devised or intended to devise a scheme to defraud by means of at least one of the false representations, pretenses or promises described or referred to in any such count.

To prove the existence of the scheme or artifice alleged in the indictment it is necessary for the plaintiff to prove beyond a reasonable doubt as that phrase has previously been defined to you that the defendants devised or intended to devise that scheme or artifice substantially as it is described in the indictment. Such proof is not made by proof of another or different scheme, or by proof of various separate and independent schemes to do some of the things alleged in the indictment to have been part of the scheme there described. In other words, proof that the defendants devised or intended to devise one or more unrelated and independent schemes, each one of which included only a part of the things alleged in the indictment, would not be proof that the defendants devised or intended to devise the scheme or artifice described in the indictment.

The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for [764] reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to

disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage.

No proof has been offered with regard to the following overt acts of count 15 of the indictment—these various overt acts beginning on page 34 of the indictment—and you are therefore to disregard the allegations of overt acts numbered: 15, 18, 19, 21, 22, 23, 26, 28, 31, 32, 35, 34, [765] 36, and 40.

Now, gentlemen, you are not to be in any way biased or prejudiced against or in favor of the plain-

tiff because of those allegations in the indictment, nor are you to be biased or prejudiced either in favor or against the defendants, or any of them, because those charges were contained in the indictment. You just consider as though the clauses were never there.

Fraud alone, as operated against the public, is not punishable under a federal law. It may be interesting to the State officials but it is not interesting to the federal court. It is only when the mails are used in some way in connection with such fraud that it becomes punishable under our jurisdiction and under these mail fraud counts. The fact that anyone was defrauded by the Reed deal or any other deal which has been testified to here would be of no interest to the federal court at all, but would be, if anything, a state matter. Congress has declared that the mails must not be used in any wise to further fraud or deception for the purpose of obtaining from others their money or property. Where a scheme to defraud or for obtaining money or property on false representations and promises has once been established, each letter mailed in furtherance thereof becomes an offense, and an indictment could charge as many counts as there were letters mailed for such purpose.

Any false, deceptive or deluding pretense put forth through the mails to obtain other people's money is an offense under this law. Mere falsity of representations, is not, however, sufficient. A false representation does not amount to fraud unless it is made with fraudulent intent.

The first question for you to determine in connection with the mail fraud counts of this indictment is this: Was [766] there a scheme to defraud? If the evidence fails to satisfy your minds beyond a reasonable doubt that there was devised a scheme to defraud, then it will be unnecessary for you to consider further the evidence, for the reason that, without the existence of a scheme to defraud on the part of these defendants, or some of them, there could be no conviction under the indictment. The existence of a scheme to defraud is one of the essential elements of a charge under the mail fraud statute.

Before you can lawfully return a verdict of guilty upon any of the mail fraud counts, it is necessary that you be convinced from the evidence beyond a reasonable doubt, that the particular defendant, the question of whose guilt is being considered by you, used or caused to be used the post office establishment of the United States in the manner alleged in the particular count being considered.

You are instructed that it is the law that no matter how sound or how practical a scheme or business undertaking may be, and no matter how much faith those devising it have in the success of the undertaking, if it is the intention of those devising it or executing it to obtain money by false representations, false pretenses or false promises, it is such a scheme as the statute contemplates, and if in executing the scheme or undertaking, false representations, false pretenses or false promises were made by the defendants, or any of them, for the purpose of obtaining money with knowledge of the falsity there-

of, that would constitute a violation of the statute, provided the mails of the United States are used in furtherance of the consummation of said scheme as pointed out in these instructions.

Now, as I have stated, the gist of the offense under these mail fraud counts is the misuse of the United States mails. [767] It is not necessary, under the statute, that a fraudulent scheme or artifice, when formed, shall contemplate the use of the United States mails as a means of its execution, as the use of the mails in furtherance of a fraudulent scheme or artifice may be an afterthought not included in the original fraudulent scheme. The point is, were the mails actually used.

In a scheme to defraud where two or more participate, one man may form and accomplish it, with or without assistance; but all who with criminal intent join themselves even slightly to the principal schemer, are subject to the statute, although they may know nothing but their own share in the aggregate wrongdoing.

Generally, with respect to this question of fraudulent intent, it may be said that its existence or non-existence is to be determined by you from all the facts and circumstances admitted in evidence, and your practical experience and daily observations of the intents and acts of men will materially aid you in determining this matter of intention. The intent with which an act is done may be clearly and conclusively shown by the act itself, or by a series of acts, or by the circumstances under which the acts were com-

mitted. In many cases, the actions of men speak their intentions more clearly and truthfully than words.

The intent or intention with which acts are committed is manifested by the circumstances connected with the transactions and the sound mind and discretion of the accused. The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required, nor, indeed, can it ordinarily be so shown; but it is generally derived from and established by all of the facts and circumstances attending the doing of the acts complained of as dis- [768] closed by the evidence. In order for you to determine this question of intent, you will look to all of the evidence in the case, oral and documentary, and to all of the facts and circumstances in connection therewith. It is, of course, true that a fraudulent intent is never presumed. On the contrary, the law presumes that all men are honest in their motives and their dealings, their relations with others; that they are always actuated by good faith and must not be adjudged in want thereof, or to be inspired by evil intent except upon proof of the same beyond a reasonable doubt. So, too, in this same connection, where a given transaction or series of transactions that may be called in question is reasonably susceptible of two different constructions, one that is fair and honest and in consonance with good faith, and the other dishonest and in keeping with the fraudulent intent, then the law says that the jury must adopt the construction in favor of honest, fair dealing and good faith and reject the other looking to the contrary direction.

In a scheme to defraud where two or more participate, one man may form and accomplish it, with or without assistance; but all who with criminal intent join themselves even slightly to the principal schemer, are subject to the statute, although they may know nothing but their own share in the aggregate wrongdoing.

In the foregoing instructions the Court has used the expression 'used or caused to be used the Post Office establishment of the United States.'

In explanation of the foregoing, it is not necessary to warrant a verdict of guilty upon one of the mail fraud counts, that a defendant be shown by his own hand to have placed in the post office the mail matter therein described, thereby causing it to be delivered by mail. [769]

The one who placed it in the post office may have been entirely innocent.

In determining whether such defendant caused the use of the mails of the United States as alleged in the indictment, you will take into account whatever the evidence has shown, if anything, such defendant had to do with the therein-described mail matter before its mailing; and, in determining whether such defendant caused the described use of the United States mail, you have a right to give weight to the presumption that every man is presumed to intend the natural and probable consequence of his voluntary act. This presumption is not a conclusive presumption but may be rebutted.

If you do not find from the evidence, beyond a reasonable doubt, that a defendant devised the

scheme or artifice to defraud described in a particular count or that to which reference is therein made, or joined in the scheme, his using or causing to be used the United States mails would not constitute an offense and you should acquit such defendant on such count.

The mere placing or causing to be placed in the United States mails of the described mail matter thereby causing its delivery by the United States mails as alleged in the mail fraud counts is not an offense unless it was done for the purpose of executing a scheme or artifice to defraud devised as therein alleged.

It is for you to determine whether or not any letter was mailed as alleged in the indictment or introduced in evidence herein. In that connection, you may take into consideration all the circumstances; that is, all the items of direct and circumstantial evidence—the fact that the letter was written on the stationery of a particular company headed at Los Angeles, that the company conducted its business [770] and had its main office or an office there, that the letter was written with respect to such business, was mailed in the regular course of business, the custom of that business as to mailing, that a letter was apparently received by the addressee through the mails, that responsible parties caused the letter to be mailed, etc. These are but illustrations of items of evidence which you may consider in determining whether or not the mails were used in connection with any particular letter. No one element may be conclusive. You may take all of them into consideration in deter-

mining whether or not the mails were used as alleged in the indictment.

Now having devised a scheme or artifice to defraud, if a defendant or defendants are found by you to have deposited or to have caused to be deposited the letters described in the indictment in the mails in this district, each defendant is responsible therefor, regardless of which defendant deposited or caused the depositing, provided such defendants were parties to the scheme to defraud as charged at the time any such letters were mailed. On the other hand, if any particular defendant or defendants became party or parties to the scheme only after the letters were mailed, such defendant or defendants cannot be found guilty. That is, defendants must be shown to have become parties to the alleged scheme prior to the mailing of each separate letter alleged. Thus, if in your judgment you so conclude, some defendant or defendants may be found guilty under one or more counts of the indictment, and not guilty as to other counts.

You should not find a defendant guilty unless you are convinced, beyond a reasonable doubt, that one or more of the false representations or promises described in the indictment were a part of a scheme of his to defraud, even thought [771] you are convinced by the evidence beyond a reasonable doubt that in furtherance of a scheme to defraud such defendant made false representations and promises not described in the indictment, but you may consider other false representations and promises of a defendant, if any have been shown, of a similar

character, in determining his intent in making any of those described in the indictment which it has been shown by evidence, beyond a reasonable doubt, he made.

You are instructed as to each of the count letters that as to those defendants whose names do not appear upon the letters charged in the indictment, in order to find that they had implied knowledge of the writing or mailing of the said letter, you must first be satisfied beyond a reasonable doubt that they were parties in knowledge to the fraudulent scheme or artifice.

You are instructed that before you can find guilty any defendant who did not use the mails by forwarding a letter within the manner charged in the indictment, you must find, beyond a reasonable doubt, that he had actually joined with the defendant so using the said mails in the alleged scheme for the purpose of defrauding in the manner alleged in the indictment as you have been fully advised in other instructions given.

Exhibit No. 144 is a letter allegedly received by the witness Wright. This letter has been handed to you for inspection. You must decide whether or not it was mailed, and in making such inspection of the letter as you desire to make, you are instructed that you are at liberty to weigh the probability or improbability from such physical inspection of the document whether the same was or was not ever placed in an envelope, and was or was not transmitted through the United States mails. [772]

If any one of the letters described in the mail

fraud counts of the indictments was not mailed or caused to be mailed by the defendants in execution or attempted execution of the scheme or artifice alleged in the indictment, but in execution of some other scheme or artifice—even though such other scheme or artifice was one to do some of the things alleged in the indictment to have been part of the scheme there alleged—you must acquit the defendants on the particular count in which such letter is set out.

You will recall that the indictment charges certain letters to have been sent through the mails and that they were deposited in the United States mails by the defendants in execution of the scheme to defraud. The letters standing alone may not be sufficient to show a fraudulent intent, but you may consider them in connection with all other evidence in the case in order to determine with what intent they were so used. In addition to the letters set forth in the indictment, other writings and evidence have been introduced here for the purpose of aiding you in determining the intent of the defendants. You have a right to consider these writings, together with other evidence in the case, in determining this question of intent.

And where, as here, a specific criminal intent is a part of an offense, in order that a principal may be convicted by reason of the acts of his agents, it must be shown that the principal knowingly and intentionally commanded, aided, advised, or encouraged the criminal act committed by the agent, or assented to it.

Good faith, as I have said, is a complete defense to a prosecution for use of the mails to defraud. That is, if the persons or any of them charged with the offense did the acts charged honestly and in good faith, in the justi- [773] fiable belief that they were or he was acting honestly and in the pursuit of a legitimate business, and without intent to defraud, then there is no such scheme or artifice to defraud as is necessary to be proved in cases of this sort. Therefore, if you believe from the evidence that any defendant did whatever he may have done in good faith, without knowledge of any scheme or artifice to defraud, and without any intention of defrauding anyone, or even if you have a reasonable doubt as to whether such was not the case, you must find such defendant innocent of the charges against him.

The intent of a defendant charged under the provisions of the law stated is a material element necessary to prove the offense, and in arriving at a decision upon that question all the facts and circumstances shown in the case as touching the conduct of the defendants should be considered. If a defendant makes a representation to another as to things which do not exist and it appears that he had no reasonable ground to believe that the fact was as he stated it, such statements and conduct are to be taken into consideration in determining whether an innocent misstatement was made in good faith; or whether the intent was that others were to be deceived; that the defendant should reap a benefit and the other suffer a loss. Criminal in-

tent may be implied from the acts and conduct of a defendant. His acts and his conduct, as shown by the evidence, considered in their relation to the charge made, may establish satisfactorily a criminal intent. If the statements alleged to have been falsely and fraudulently made by a defendant were made in good faith, and at that time the defendant believed or had reason to believe they were true, they would not be evidence of a fraud. [774]

The indictment alleges that the scheme was to obtain money or property by false pretenses, representations and promises.

A false representation relates to something past or existing at the time the representation is made and then known to be false and made with the intent and purpose to induce another to act to his prejudice in the belief that it is true.

A false promise differs from a false representation in that it relates to something promised to be done in the future.

If such statements were entirely false and known by a defendant to be false, and he well knew that he had no reason to believe them to be true, they would, within the meaning of this law, be false promises.

The foregoing instruction relating to the difference between a false representation and a false promise is based upon the allegations of the indictment and you are not to infer from the giving of such instruction that the Court means to imply aught as to the evidence in the case, because you are, as I have said, the sole judges of it. I simply

want to point out to you the distinction between the two.

There are certain elements necessary whether it be a false representation or false promise that is being considered, the absence of any one of which results in there being, in law, no false representation or no false promise.

First, one must state something to be true.

Second, the thing stated must, in fact, be false.

Third, at the time of stating it a defendant must know it to be false.

Fourth, a defendant must state it as true with the intent on his part that another should act, to his prejudice, [775] relying upon the truth of the false statement.

A defendant is not guilty if you find that his plan or scheme was merely improvident or impracticable and no more. Defendants are not on trial for mere errors of judgment or negligence in their conduct of business.

A defendant's good or bad faith in these matters is to be determined and his several acts and declarations construed and interpreted, by conditions as they existed at the time the acts were done and declarations made, and as they appeared to such defendant at that time, and not as subsequently shown in fact to be.

The mere fact that a representation made by a defendant was untrue, would not be sufficient to constitute fraud on his part, unless at the time of making such statement such defendant knew it to be false or knew he had no reason to believe it to

be true. This knowledge must be actual knowledge upon his part. There is no fraud in a misrepresentation which the maker believes to be true, even though he has been negligent or too credulous or visionary, but the mere fact that there had been represented to a defendant that which he in turn represented, as alleged, would be no defense if such defendant knew it to be false at the time of his making such representation.

An honest expression of opinion actually entertained or such an honest representation in regard to a matter of estimate or judgment, though it proved to be erroneous, is not such a false or fraudulent misrepresentation as the defendants are charged with making in this case.

If one, after learning of the falsity of a representation, continues to make it, he cannot escape responsibility because he originally believed it to be true.

While there may be liability for damages in a civil [776] suit on account of things promised which did not come to pass, one would not be guilty of a crime unless he knew that a promise made was false when made.

No matter how unwarranted by the facts or extravagant a promise may be, if the party making it honestly believes that it will be carried out, there is no guilt.

The extravagance of a promise or the puffing or the honest belief that something is going to happen doesn't mean fraud. That is true as to future or contingent promises or statements as to future or

contingent events or as speculations or probability.

You are instructed that with respect to any alleged representation embodying or amounting to an expression or statement of opinion, such representation cannot be found to have been false merely because such expression or statement of opinion now turns out to have been erroneous or different from the opinion of some other person or persons. If such opinions were expressed honestly and in good, faith and with reasonable grounds for the belief upon which they were based, then they cannot be held or found to have been fraudulent.

You are instructed that business dealings between two or more corporations are not made fraudulent or wrong by the mere fact that some individual may be an officer or director in two or more corporations. Therefore, in this case you are not at liberty to infer that there was devised a scheme and artifice to defraud, simply from the fact that in one or more of the transactions there may have been an overlapping directorate. That is a fact that you may take into consideration together with the other facts as bearing on the question of whether there was a fraudulent intent.

There is no presumption that a scheme or artifice to [777] defraud, even if shown to have existed at one time, continued to exist at any later or subsequent time. Therefore, the plaintiff's burden of proving that the scheme or artifice alleged in the indictment was in existence at the time of the alleged mailing of each of the letters described in the indictment, is not sustained by evidence that

such alleged scheme or artifice existed or might have existed at some time prior to the alleged mailing of any particular letter.

The fact that letters other than those specifically alleged in the indictment may have been mailed or caused to be mailed by the defendants, or some of them, is entirely immaterial in determining, as I have said, other than the intent.

As I have instructed you, the first 14 counts of the indictment, eliminating Counts 3 and 10, are what we call the substantive counts, and in each of these counts the defendants are charged jointly with having devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from certain persons mentioned in the indictment and other persons whose names are to the grand jurors unknown and from investors in the Railway Mutual Building and Loan Association who had theretofore converted and transferred their investments in that association into securities of the First Security Deposit Corporation; all of which persons and class of persons are referred in the indictment as persons intended to be defrauded, by means of false and fraudulent pretenses, representations and promises. You are instructed that, while it is competent for you, in considering the evidence, to render a verdict of guilty against only one defendant, if you find beyond a reasonable doubt that he alone indulged in a [778] fraudulent scheme within the terms of this indictment, as the same has been interpreted to you in these instructions, at the beginning or after the

enterprise started, and caused the mails to be used in any instance as charged in furtherance of that scheme, however, the last, or 15th count, charges all of the defendants named in the indictment as partners in crime, charging that they had devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from those persons described and named in the first count of the indictment as the persons intended to be defrauded, and, for the purpose of executing such scheme and artifice, to place and cause to be placed in the post office establishment of the United States letters, etc., and other mail matter, as alleged. Now, a conspiracy, such as here alleged, is not an omnibus under which the prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment charges but one conspiracy, and no defendant can be convicted thereunder unless it can be shown beyond a reasonable doubt that he consciously became a member of that particular conspiracy. Further, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope of the evidence, but cannot extend it. As to the defendant Twombly, the indictment is, as I have heretofore explained to you, also limited by the bill of particulars.

I have also heretofore explained to you, in connection with the mail fraud, or substantive, counts

of the indictment, that there are two elements to the mail fraud offense within the criminal code: First, the devising of some [779] scheme or artifice of a kind described, and, second, the use of the mails in execution, or attempted execution, thereof, as indicated in the statute. As I have said, under these mail fraud counts, the crime is complete when the scheme to defraud is devised and mails are used in an attempt to execute it. These mail fraud counts require a specific intent to defraud; they do not require any intent to use the mails in that connection. The crime becomes complete after the mails are actually used, whether the parties intended to so use them or not.

Now, under this 15th, or conspiracy count, there must not only be the intent to defraud, but there must be also the intent to use the mails in the execution, or the attempted execution of the fraudulent scheme. You must then remember that in the conspiracy count there must be both an intent to defraud and an intent to use the mails in the carrying out, or in the attempted carrying out, of the fraudulent scheme; also, there must be two defendants conspiring. A man cannot conspire with himself.

A conspiracy, within the terms of the criminal code, is a combination of two or more persons by concerted action to accomplish a criminal and unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. It is a partnership in criminal purposes. The gist of the crime is the confederation or the combination of the minds.

A conspiracy to commit the offense of using the mails in execution of a scheme to defraud involves not only a conspiracy to devise a fraudulent scheme, but a conspiracy to use the mails in its execution. Parties to such a conspiracy, who did not intend that the mails should be used, are not subject to conviction under this 15th count, [780] because conspiracy is, essentially, a crime of intent. It is not, however, necessary that there be an actual mailing of a letter in order that there may be guilt of a conspiracy, if the intent to so use the mails is present.

Under this conspiracy count there are really three elements of the offense: (1) The devising of some scheme or artifice of the kind described in the statute; (2) A use of the mails in execution, or attempted execution, thereof, in one of the three ways specified in that statute; and (3) An intent to use the mails in execution, or attempted execution, of the fraudulent scheme.

Title 18 USC, Sec. 88, provides:

'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished' as provided in the act.'

A conspiracy is constituted by an agreement; it is, however, the result of the agreement and not the agreement itself. No formal agreement between

the parties is essential to the foundation of the conspiracy. People very seldom sit down and say, 'Let us conspire right here and now to do certain things and put it down in writing.' Human beings don't do that. The agreement may be shown if there be concert of action, all parties working together understandingly, with a single purpose for the accomplishment of a common purpose.

The purpose to be accomplished by the conspiracy may be either lawful or unlawful. If the purpose is lawful [781] and is carried out by lawful means, then no offense is committed under the statute. If the purpose is lawful and is carried out by criminal or unlawful means, then the statute is violated. On the other hand, if the purpose is unlawful and is carried out either by lawful or unlawful means, the statute is violated. The only time the statute is not violated in those illustrations is where the purpose is lawful and is carried out by lawful means. Then no crime has been committed. The purpose of the conspiracy may be continuous. That is, it may contemplate a commission of several offenses or overt acts. The agreement forming the basis of the conspiracy may be a continuing one, and the conspiracy itself may be a continuing one, contemplating a whole series of unlawful acts, or unlawful course of conduct extending over a considerable period of time.

The crime is completed when any one overt act, to effect the object of the conspiracy, is done by at least one of the conspirators. An overt act is something apart from the conspiracy itself, and is an act

to effect the object of the conspiracy. It need be neither a criminal act, nor the very crime that is the object of the conspiracy. That is, the overt act does not have to be a criminal or an unlawful act. It must, however, accompany or follow the agreement, and must be done in furtherance of the object of it.

All of the conspirators need not join in the commission of an overt act, for, if one of the conspirators commits an overt act, it becomes the act of all the conspirators.

The conspiracy alone does not constitute the offense, as I have heretofore indicated. It needs the addition of [782] the overt act; such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or further complete their guilt by it, consummating a crime cognizable by our courts.

The indictment in this case charges that certain overt acts were committed by some one or other of these defendants and of the alleged joint conspirators in furtherance of, in execution of or to effect the object of such willful and unlawful conspiracy.

It is not necessary that all of the alleged overt acts be proved. It will be sufficient to complete the offense if the proof establishes one of the alleged overt acts performed by any one of the conspirators while the conspiracy was in progress and after each of the alleged conspirators became a party to the unlawful agreement. Mere commission of any or all of the overt acts charged in the indictment

will not be enough to warrant a verdict of guilty against any or all of the defendants on this Count 15 unless you find that there was an unlawful agreement, and that one or more of those acts were done by one or more of the conspirators, in furtherance of the conspiracy, and during its continuance.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful crime or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly [783] come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendants were active parties thereto.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one perform-

ing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. The acts or declarations of a party shown by the evidence to be a member of a scheme to defraud by use of the United States mails, a conspiracy so to do, if any there was, done or said prior to the formation of any scheme or conspiracy, are not to be considered by you against any other defendant. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assist in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into [784] the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

The evidence, as I have said, in proof of a conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show

the existence of the conspiracy or fact sought to be proved, as I have heretofore indicated, but such circumstantial evidence must be inconsistent with any other rational conclusion.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if a defendant, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any manner by affirmative action in the accomplishment of the unlawful act, [785] he would be guilty. To this statement there is one exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid or participation, and such conspirator withdraws from the conspiracy and

wholly disassociates himself from the project or the carrying out thereof, he ceases to be a conspirator and is without guilt.

You are instructed that the existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence. Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy.

When, as here, one large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain conviction; nor will conviction be sustained by proof of a crime committed by one or more of the defendants, which is wholly apart from and without relation to others conspiring to do the thing forbidden.

While mere knowledge that others are violating the law does not make one a principal in the commission of such an offense, even though, having such knowledge, one does nothing to defeat the criminal purpose of those engaged in the commission of the crime, yet, where men have agreed, acting upon a common purpose, to commit a crime, during the continuance of such conspiracy the conspirators have made one another agents to act in furtherance of the conspiracy. Each conspirator, by such criminal agreement, has started evil forces and he cannot free himself from liability criminally for the

consequences—including acts of other [786] conspirators to effect the object of the conspiracy—merely by turning his attention to something else. To avoid criminal liability, one once having conspired with others to commit a crime must withdraw his support from the criminal forces which he has started. This requires affirmative action upon his part—the doing of some act to disavow or defeat the conspiracy into which he has entered.

No statement, declaration or conversation of any defendant can be considered by you, as against any other defendant for the purpose of determining whether or not a conspiracy existed as charged; and if, disregarding and giving no effect to any such statement, declaration or conversation of the other defendants, you have a reasonable doubt as to whether or not the remaining evidence proves the existence of such conspiracy, then you must acquit those defendants.

You are instructed that the evidence shows that when the loan to the Pierce Petroleum Company was made by the Investment Finance Company in 1935 that it shows that that was made at that time and there is no evidence in the record that any of the defendants were directors of Pierce Petroleum Company at that time, and you may so find.

Unless you find that there was a concert of action between the various defendants under the substantive, counts, or a conspiracy under the 15th count, the evidence is received only as to the particular defendant whom it concerned.

If you are satisfied, from all of the evidence, that the sellers of the bonds and stock or stock or bonds in question were told that they would receive a certain price in money for their securities and if they decided to take this price and to receive the same in cash and they were [787] paid in cash and received exactly what they bargained for then there can be no offense and the defendants, and each of them, are entitled to a verdict of not guilty, provided there was no fraud or misrepresentation in connection with the transaction.

It is alleged in the indictment that the defendants at all times represented and pretended that said First Security Deposit Corporation was organized for the purpose of and was duly and actively engaged in the liquidation of assets received by it from the Railway Mutual Building and Loan Association, whereas, in truth and fact, the defendants, and each of them, knew that no such liquidation was being carried into effect. You are instructed that the question as to whether such liquidation was being carried into effect is a question of fact for your decision. You are to understand, of course, that the word 'liquidation' does not mean sale for cash. The liquidation might require several steps before a complete reduction to cash was possible and might conceivably involve several exchange transactions.

Now, it is a fact, and you must so find, that the defendant Twombly had no connection of any kind with the organizing or forming of the First Security Mortgage Corporation, the First Security Deposit

Corporation, R. F. D. Discount Company, Inc., or Consolidated Investors, a corporation. He was not an officer or agent of the First Security Mortgage Corporation, R. F. D. Discount Company, Inc., or Consolidated Investors, a corporation. The plaintiff does not contend that the defendant Twombly exercised control, as I have shown you, over either the First Security Mortgage Corporation, R. F. D. Discount Company or the Consolidated Investors.

[788]

You are instructed that the testimony of the witness Perkins and the witness Forrest Betts was not admitted as against the defendant Twombly, and you are not to consider it in that connection.

With reference to the allegation in the indictment, 'That on or about the 15th day of March, 1939, at Los Angeles, California, defendants Russell W. Starr, Alfred R. Ireland, Edward C. Thomas, Joseph L. Smale and J. Howard Edgerton attended a meeting of the Board of Directors of the Investment Finance Company,' that that transaction took place after the date on which the plaintiff admits that the defendant Twombly is not chargeable. He on that date withdrew, if he was ever, as a member of the conspiracy within the terms that I have been giving you. He severed his connection with all of the corporations on the 21st day of December, 1938, and the plaintiff doesn't claim that he is chargeable with any criminal action which happened subsequent to that date.

Now as to the Defendant Cronk, the theory of the indictment and of the prosecution is that the de-

fendant Cronk, although not one of the original joint schemers, or the original conspirators, or connected with the consummation generally, either knowingly joined the general conspiracy or combination, or both, and participated in the execution of their purposes. Now this theory doesn't require that each member of the combination or each of the conspirators shall participate in or have knowledge of all its operations. A defendant may join at any time in the progress of the combination or the conspiracy and be held responsible for all that has been done, or may be done, until he terminates his connection. It is not necessary to this defendant's guilt, as we have said, that he be one of those who originated the scheme or device to defraud or that he was one of the original conspirators. [789] That is, he need not have been one of the first who schemed or conspired as alleged, but it is necessary to guilt that he be shown by the evidence, beyond a reasonable doubt, to have become one of the schemers as to the mail fraud counts, and that thereafter the mails were used in carrying out the scheme, or one of the conspirators during the continuance of the conspiracy, as to the 15th count of the indictment, and that thereafter one or more of the overt acts alleged were done as alleged. Unless you find that to be the fact, you must find the Defendant Cronk innocent of the charges.

The fact that you find that a combination to effect a scheme or artifice to defraud, or a conspiracy to defraud, was formulated prior to the Defendant Cronk's connection therewith—if you do find such

a connection or joining by Cronk, or such conspiracy—that does not in any way tend to charge the Defendant Cronk with a knowledge thereof, unless you also find that the existence of said scheme or artifice to defraud and said conspiracy or the combination and the objects of it were communicated to him or that he was apprised and had knowledge of the existence of either or both, if you find he joined both.

With reference to the testimony of the witness Walker, this witness testified that he made a proposition for the sale of his bonds to Mr. Cronk, and you will consider such testimony as to whether or not he made this proposal to Mr. Cronk freely and of his own volition, rather than by reason of any statements, written or oral, made by him to Mr. Cronk, and if you so find then you will disregard the testimony of said witness.

Now Cronk was a temporary employee of the Investment Finance Company on a month to month basis, commencing on the 7th day of July, 1937, and ending on the 31st day of October, [790] 1938, and therefore he is not chargeable with any criminal action set forth in the indictment after that date, and you will so find. He was not at any time a stockholder, depositor, security holder, officer, manager, or employee of the Railway Mutual Building and Loan Association, Bond 17 Dog Food Company, American National Bank of Santa Monica, or Pierce Petroleum.

Now with reference to the charge in the indictment which I have read to you a short time ago,

as to the meeting of the Board of Directors on the 15th of March, 1939 of Investment Finance Company, that took place after the Defendant Cronk left or had any connection.

As I have said, in connection with all actions and declarations of any of the other defendants happening or done subsequent to October 31, 1938, the Defendant Cronk is not chargeable therewith.

In determining the intent with which Mr. Cronk acted, you may take into consideration the fact that he was a month-to-month employee, working on a salary, he had no stock interest in the Investment Finance Company or any of the other companies referred to in the indictment or in the evidence, and had no way of making any profit through the sale of those stocks, only for the purpose, of course, in determining what his intent may have been, because it is not necessary for a man to make a profit on the deals.

Now I want to talk to you a little bit about this Exhibit 216 which, as you will recall, is the alleged statement of the Defendant Twombly. You were admonished upon the introduction of this evidence that the same was introduced as against the Defendant Twombly only, and likewise restricted as to the said Defendant Twombly as bearing only upon the element of intent. Now in connection with that instrument, [791] and also in connection with this audit report and Exhibit 155, and any other exhibits which have been restricted to the subject of intent, you must be very careful not to consider

those as evidence in any way of the facts which are indicated or of the acts or declarations which are indicated in those instruments. They are not evidence. They are only admitted for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved.

As to this Exhibit 216, it was as to the intent of the Defendant Twombly, as was also Exhibit 155, you are entitled to consider that document in relation to the intent, if any, that Twombly may have had with reference to his participation in the alleged scheme and artifice to defraud prior to December 21, 1938, when he severed his connection.

In arriving at this fact, you are instructed that the plaintiff has offered proof that the statement was written by the Defendant Twombly after his separation from his co-defendants and the companies mentioned in the evidence; that he was interrogated with reference to the said statement on July 9, 1940, a period of about one year, six months and 20 days after the admitted date of his separation from said defendants and said companies. There is no evidence before you as to when, after the Defendant Twombly separated from said companies, he wrote said statement, except as I have just stated.

The record also shows that some time about July of 1939 that that instrument came into the possession of the witness Webster, one of the postal inspectors.

You are not to consider the statement as determining the truth or falsity of matters therein related. There is further evidence that the Defend-

ant Twombly stated that he made the statement based upon matters that had come to his [792] knowledge during his association with the companies, and you are instructed that as a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit, December 21, 1938, and that the knowledge of the matters therein stated, if in truth and fact such knowledge was ascertained by Defendant Twombly prior to his disassociation, was ascertained at or about December 21, 1938.

You are instructed that it is the province of the jury to determine whether or not the Defendant Twombly believed that the said statements were true or false when made, and also it is your duty from the evidence to decide whether or not the information thus received, if it was in truth and fact received prior to his disassociating himself from said defendants and said companies, and thus construed by the said Defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies.

Should you find that a conspiracy to effect a scheme or artifice to defraud was formulated at any time prior to the first day of November, 1934, such finding, in and of itself, does not in any wise tend to charge the Defendant Twombly, or any other defendant, with a knowledge thereof, unless you also are able to find that the existence of said scheme and artifice to defraud was communicated to said de-

fendant and he was apprised and had knowledge of its existence.

If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants, other than the Defendant Twombly, then you are at liberty to find [793] that the defendants depressed and caused to be depressed the market price of the securities of the First Security Deposit Corporation as alleged in the indictment. As to the Defendant Twombly, the plaintiff has limited, by its bill of particulars, the activity of that particular defendant on this particular matter only as to the bonds of the company.

The defendants, or their counsel, have elected to submit this case for your decision without producing any witnesses in their own behalf. This is a right which they clearly enjoy under the law, and the jury are instructed not to draw any inference of guilt from the fact that the defendants have not themselves taken the witness stand, or produced any other witnesses in their own defense.

Now as to all of the 15 counts of this indictment, with the exception of the two which have been dismissed, which we do not consider, each defendant on trial has entered a plea of not guilty.

An entry by an accused person of a plea of not guilty places upon the prosecution the burden of showing, by evidence beyond a reasonable doubt,

the truth of every material allegation of the accusation upon which the accused is being tried. No burden rests upon a defendant to prove his innocence.

Upon each count of the indictment you will separately consider the question of whether the guilt of the particular defendant being considered by you has, by evidence, been shown beyond a reasonable doubt, and if you have a reasonable doubt concerning any material allegation of the particular count being considered by you as touching the particular defendant being considered by you, you will give him the benefit of such doubt and acquit. If you have no such reasonable doubt, your verdict must be guilty. [794]

If, after you have retired, there arises a disagreement among you as to any part of these instructions or the testimony, or if you desire to be informed or reinstructed on any point of law arising in the case, you must ask the Bailiff to bring you back into court, whereupon the information will then be given you.

It has been stipulated that you may take with you a copy of the indictment, a copy of the bill of particulars, and all of the exhibits except the books of account. The books of account will be left here because they contain many items which were not introduced in evidence. If you desire to be informed or to refresh your memory as to any item or items in the books of account, please communicate with the Bailiff and you will be brought back into court for that purpose. Certain documentary

evidence was introduced which is contained within a book covering other matters. I have directed the Clerk to seal off that portion not admitted in evidence and you are instructed not to examine it or consider it in any way.

Now, gentlemen, do you want a copy of the bill of particulars as furnished by the plaintiff to go also to the jury, or would you prefer not?

Mr. Adams: I would like to have it, your Honor. Your Honor read several pertinent parts of it, and did not read others which we consider very pertinent, and we would prefer, for that reason to have it go to them.

The Court: May it be so stipulated, gentlemen?

Mr. Campbell: It is all right with the plaintiff.

The Court: Is it satisfactory to all the defendants?

(Assent.)

Mr. Adams: May I call your Honor's attention to one word, which I think your Honor said— [795]

The Court (Interrupting): You are a little out of order at the present time. I will call you at the time.

Mr. Adams: I beg your pardon.

The Court: You are instructed that should you be unable to agree upon a verdict as to any one or as to all of the defendants, you are still entitled as jurors to bring in a separate verdict as to any defendant or defendants.

Now, gentlemen, you 11 men constitute the jury in this case under the stipulation of the court with

like effect as though you were 12. You must unanimously agree under our practice.

On retiring you should first elect a foreman. You will be handed certain forms of verdict as to each defendant. When you have decided upon a verdict, your foreman should fill out the appropriate form in accordance with the verdict, or the various forms in accordance with the verdict, and should date it and sign it.

I shall now ask counsel for the plaintiff if there are any objections to the instructions.

Mr. Campbell: No objections, your Honor."

[796]

"The Court: Now do counsel for the defendants wish to make any objections before the jury or would they prefer to have the jury retire for the purpose of making their objections?

Mr. Irwin: Your Honor, I understand we must make them in the presence of the jury. I would be very happy to do it either way. What is your Honor's understanding?

The Court: I think that if you are willing to do it in front of the jury, it is sometimes very helpful to them.

Mr. Irwin: There is only one, your Honor, that I think—I want to direct your Honor's attention to Defendants Starr, Smale and Thomas proposed Instruction 59. I except to that instruction for not being given.

The Court: Let me see it.

Mr. Irwin: May I hand it to you? I have it right here.

The Court: I don't seem to remember that instruction at all by number.

(The document referred to was passed to the court.)

The Court: I have already given this, the identical wording.

Mr. Irwin: The last portion I don't think was.

The Court: I will go over it again because it is correct.

When you retire to the jury room you should freely discuss and consult with each other as to the verdict which you are to render; but each juror is entitled to his own individual opinion on the facts and the weight and effect of the evidence. No juror [797] should surrender such opinion simply because of the opinion of the other jurors; and if any juror has a reasonable doubt as to the guilt of any defendant, his opinion in that regard should not be surrendered, so long as the doubt remains.

Mr. Irwin: Thank you, your Honor.

Now, may it please the court, in view of your Honor's assistance given before, may I just except by numbers to certain ones?

The Court: Are they all in here?

Mr. Irwin: Here is the rest of them.

The Court: Let me glance at each number as you give it.

Mr. Lawson: Our numbers are the same, your Honor.

The Court: I think so; yes. If you will just give me the numbers, I will look at them and follow along.

Mr. Irwin: Yes, your Honor.

87 to 91, inclusive.

The Court: 90 was one of yours.

Mr. Irwin: As I have my notes here, it is all those from 87 to 91.

The Court: The exception will be allowed as to 87, 88 and 89.

90 I will read to the jury:

You are instructed that the First Security Deposit Corporation, as the evidence shows, was organized in part for the purpose of, and was duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and in turn deposited with the Metropolitan Trust Company, as trustee, as security for the collateral [798] trust bonds, pursuant to and in conformity with the trust indenture, Exhibit 51, creating said trust.

Mr. Irwin: Then, your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, your Honor. I am quite in accord with your Honor on the evidence, but

the objection is made that the instruction should be that the whole allegation since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand your Honor's instruction was that simply there was no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph, that those particular words alluding to approval by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contain a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph. [799]

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

* * * * *

"The Court: Do you wish to join, on behalf

of your clients, in all of those objections and let exceptions be noted in the record also?

Mr. Lawson: Yes, your Honor.

The Court: That is allowed as to all defendants, wherever applicable."

* * * * *

Mr. Campbell: If the court please, I was going to say that there was one matter of confusion now existing; that is, as to the instruction given by your Honor with reference to the striking of certain words from the top of page 5.

As I understood your Honor's statement, or instruction to the jury, was that there was no proof of only that portion which stated 'to be approved by the Banking Commissioner or the Corporation Commissioner', or was it your Honor's instruction to the jury that there was no proof of the paragraph as it now remains after those words were stricken.

The Court: No, no. I said there was no proof of only the one element, that is, the approval by the Superintendent of Banks and the Corporation Commissioner.

The rest stands, and the proof stands.

The clerk will get together the exhibits in numerical order as fast as it physically can be done, and we will [800] hand them to the bailiffs, and they will come up and tap on your door, and in the meantime if you elect a Foreman the Foreman can then come to the door and he will hand them to you. And, remember,

if you want anything in these books of account, you may come back to the courtroom."

Said defendants requested instructions 87, 88, 89, 91 respectively, and are in words and figures following:

(Defendant J. Howard Edgerton's Requested Instruction No. 87.)

"You are instructed that the term 'market value', as the words thoroughly import, indicates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions as to standardize the price. Proof of such market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it."

(Defendant J. Howard Edgerton's Requested Instruction No. 88.)

"You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities." [801]

(Defendant J. Howard Edgerton's Requested Instruction No. 89.)

"You are instructed that there is no evidence proving that the defendants, or either of them, did convert, or divert to their own use, benefit, or profit large sums of money or property of the First Security Deposit Corporation, or of the persons described as those who were intended to be defrauded, under the pretense of loans, or by any other way or method, as charged in the indictment."

(Defendant J. Howard Edgerton's Requested Instruction No. 91.)

"You are instructed that the defendants, or either of them, did not represent to the persons described in the indictment as those intended to be defrauded, that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California."

Thereafter, on, to-wit, the third day of April, 1942, the Jury in said cause retired to consider their verdict.

Thereafter, to-wit, on the 4th day of April, 1942, said Jury returned its verdict, finding the defendant, J. Howard Edgerton, guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14.

Thereafter, on to-wit, the 13th day of April 1942, the said defendant, J. Howard Edgerton, filed his motion in arrest of judgment, which motion is in words and figures as follows:

"Comes now the defendant J. Howard Edgerton this 13th day of April, 1942, and moves the court to arrest judgment on each and every count in the indictment herein, upon which [802] the defendant was convicted, upon the following grounds and for the following reasons:

I.

That there has been no verdict against the defendant sufficient to sustain a judgment of conviction or a sentence thereon, inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

II.

That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the

grand jury, said instruction being given by the court on said date in the following language:

‘The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation. [803]

‘You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the fourth line of said paragraph and page to wit: “theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.” This paragraph will then read, and you are to consider it as reading as follows:

‘That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and

to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

III.

That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations',
for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranteed to him by Article V of the Amendments [804] to the Constitution of the United States of America.

IV.

That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

That thereafter, on, to wit, April , 1942, the Court overruled said motion in arrest of judgment, to which ruling of the Court the defendant, J. Howard Edgerton, duly accepted.

Thereupon, on the 27th day of April, 1942, the Court sentenced the defendant, J. Howard Edger-

ton, to serve a term of two and one-half years in the Federal Penitentiary as designated by the Attorney General of the United States, on each of counts 1, 4, 6, 8, 11 and 13 of the indictment, each of said sentences to run concurrently with each other, and not consecutively, and further ordered that the defendant, J. Howard Edgerton, be placed on probation under the supervision of the Probation Officer for a period of five years on each of counts 2, 5, 7, 9, 12 and 14 of the indictment. Each of said probation periods to run concurrently with each other and to commence at the expiration of the service of sentence on count 1; and the Court further ordered that the imposition of further sentence on said Counts 2, 5, 7, 9, 12 and 14 be suspended. [805]

Thereafter, and upon the 25th day of May, 1942, which is within the time provided by the rules of Court, for the presenting, signing and filing of the Bill of Exceptions herein, the plaintiff and the said defendant, J. Howard Edgerton, by and through his counsel, stipulated that the time within which the Bill of Exceptions in said action on behalf of said defendant and appellant, be settled, be extended to and including the 15th day of September, 1942; further that defendant and appellant file his Assignment of Errors and proposed Bill of Exceptions on or before the first day of September, 1942.

Whereupon, the Honorable Ralph E. Jenney, the judge of said court, made and entered on the 25th day of May, 1942, his order wherein and whereby it was ordered that the time within which the Bill of Exceptions in the above entitled action on behalf

of the defendant and appellant, J. Howard Edger-ton, be settled, be extended to and including the 15th day of September, 1942, and further, that the said defendant and appellant, J. Howard Edger-ton, file his Assignment of Errors and proposed Bill of Exceptions on or before the 25th day of July, 1942, and finally, that the said plaintiff file his pro-posed amendments, if any, to the Bill of Excep-tions on or before the first day of September, 1942. Said order was based upon the stipulation last hereinbefore referred to and good cause otherwise appearing to the said Court. Thereafter, upon the 25th day of May, 1942, an order was duly entered of record, pursuant to stipulation of the parties hereto, that the original documents offered in evi-dence in said cause that are not herein reproduced be considered as incorporated and as a part of the Bill of Exceptions in this cause as though actually a physical part thereof, and that the same be [806] separately certified by the Clerk of the Court to the United States Court of Appeals in and for the Ninth Judicial Circuit of the United States.

Accordingly, the exhibits mentioned and in evi-dence herein, which are not set forth in this Bill of Exceptions, the same being separately certified by the Clerk of this Court to the United States Court of Appeals in and for the Ninth Judicial Circuit of the United States, are hereby incor-porated and included herein and made a part hereof, the same as if actually herein set out in full. For as much as the matters above set forth do not as

otherwise appear of record, this defendant and appellant, J. Howard Edgerton, tenders this, together with the said original exhibits, as his Bill of Exceptions on his appeal sued out and taken herein by him, which said Bill of Exceptions is all of the evidence received in said cause, and prays that same may be allowed, settled, signed and sealed by the Judge of this Court presiding at the trial, to wit, by the said Honorable Ralph E. Jenney, pursuant to the statute and rules of Court in such case made and provided, to be filed and made a part of the record herein which is done according to law this 9th day of November, 1942, which is within the time heretofore granted by the court, and pursuant to the rules of Court and statute appertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein. (The court has not read the foregoing but rules entirely upon the representations of counsel as officer of this court.)

RALPH E. JENNEY,

Judge of the United States
District Court. [807]

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 14943-RJ Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,

Defendants.

**STIPULATION SETTLING BILL OF
EXCEPTIONS**

It Is Hereby Stipulated by and between the defendant-appellant J. Howard Edgerton, and the plaintiff-appellee, United States of America, through their respective counsel, that the within Bill of Exceptions be allowed, settled, signed and sealed by the Judge of this court presiding at the trial, to-wit: the Honorable Ralph E. Jenney.

Dated: November 9, 1942.

OTTO CHRISTENSEN,

Attorney for J. Howard Ed-
gerton.

LEO V. SILVERSTEIN,

United States Attorney.

JAMES L. CRAWFORD,

Assistant United States At-
torney

Attorneys for United States.

Received copy of the within Bill of Exceptions,
this 22nd day of July, 1942.

JAMES L. CRAWFORD,

Asst. U. S. Atty.

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 9, 1942. Edmund L.
Smith, Clerk. By Irwin C. Hames, Deputy Clerk.

Lodged Jul. 22, 1942. Edmund L. Smith, Clerk.
By John A. Childress, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now, J. Howard Edgerton, in connection with his notice filed with the clerk of the above entitled court, stating that he appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgments and sentences entered in the above entitled cause against him on the 27th day of April, 1942, and said defendant, having duly given notice of appeal as provided by law, now makes and files, with the said notice of appeal, the following assignment of errors herein, upon which he will apply for a reversal of said judgments and sentences, and each of them, upon appeal, and which errors, and each of them, are to the great detriment, prejudice and injury of said defendant, in violation of the rights conferred upon him by law; and said defendant says that in the record and proceeding in the above entitled cause, upon the hearing and

determination thereof, in the Central Division of the United States District Court, in and for the Southern District of California, there is manifest error in this, to wit:

I.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count 1 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are:

1. That the evidence introduced does not tend to prove that the defendant was guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

2. That the evidence is insufficient to establish the essential elements of the crime charged in that,

(a) that there is no substantial evidence, or any evidence, to show that the defendant, J. Howard Edgerton, or any of the other defendants, did depress and/or cause to be depressed, the market price of the securities of the First Security Deposit Corporation, as charged in the indictment, and that as a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the particu-

lar value thereof, as charged in the indictment.

(b) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(c) That there is no substantial evidence, or any evidence to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method, as charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the

liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

II.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count two of the bill of indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of the plaintiff's case to dismiss Count 1 of the Bill of Indictment herein.

III.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 4 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in

denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

IV.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 5 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

V.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 6 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of the plaintiff's case to dismiss Count 1 of the indictment.

VI.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 7 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

VII.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 8 and 9 respectively of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

VIII.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence in-

roduced in said cause, to direct a verdict of not guilty on the charge contained in Count 11 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

IX.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 12 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

X.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 13 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds

of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

XI.

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all of the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in Count 14 of the Bill of Indictment herein.

The grounds of said motion were, and the grounds of said error in denying said motion, were and are the grounds substantially as hereinabove set forth in Assignment No. I as the grounds of error in denying the motion at the close of plaintiff's case to dismiss Count 1 of the indictment.

XII.

Said District Court erred in denying the motion made by said defendant and appellant, after the jury had returned its verdict in the above entitled cause, finding him guilty on counts 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, for judgment therein, for order arresting judgment on each of said counts, 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, of the Bill of Indictment.

The grounds of said motion were and the grounds of said error in denying said motion were and are:

1. That there has been no verdict against the defendant sufficient to sustain a judgment of

conviction or a sentence thereon, inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

2. That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the grand jury, said instruction being given by the court on said date in the following language:

“The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

“You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the

fourth line of said paragraph and page to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading as follows:

"That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever."

"No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

3. That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

"Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations",

for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranteed to him by

Article V of the Amendments to the Constitution of the United States.

4. That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

XIII.

Said District Court erred in giving the following instructions to the Jury:

"The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit:

'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.'

This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation

would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

The exceptions with respect to the foregoing instructions were as follows:

"Mr. Irwin: Then, your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, your Honor. I am quite in accord with your Honor on the evidence, but the objection is made that the instruction should be that the whole allegation, since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand your Honor's instruction was that simply there is no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contains a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph.

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

XIV.

Said District Court erred in refusing to charge the jury as requested in defendants and appellant's Instruction No. 87,

(Defendant J. Howard Edgerton's Requested Instruction No. 87)

"You are instructed that the term 'market value', as the words thoroughly import, indi-

cates price established in a market where the article is dealt in by such a multitude of persons and such a large number of transactions as to standardize the price. Proof of such market value can only be made by one of the recognized methods of proving the price current in a market. Individual dealings are not competent to prove it."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XV.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 88,

(Defendant J. Howard Edgerton's Requested Instruction No. 88)

"You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVI.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 89,

(Defendant J. Howard Edgerton's Requested Instruction No. 89)

"You are instructed that there is no evidence proving that the defendants, or either of them, did convert, or divert to their own use, benefit, or profit large sums of money or property of the First Security Deposit Corporation, or of the persons described as those who were intended to be defrauded, under the pretense of loans, or by any other way or method, as charged in the indictment."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVII.

Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 91,

(Defendant J. Howard Edgerton's Requested Instruction No. 91)

"You are instructed that the defendants, or either of them, did not represent to the persons described in the indictment as those intended

to be defrauded, that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California."

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.

XVIII.

Said District Court erred in denying the motion of the defendant to instruct the jury to disregard the statements hereinafter set forth made by the plaintiff during the course of its opening argument to the jury, and in overruling the objections of the defendant thereto. Said statement of plaintiff, motions to disregard, and objections, and ruling of the Court, were as follows:

"Mr. Campbell: The indictment goes on to say:

'That the defendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof, directly or through the agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown, and with funds

which belonged to and were feloniously and unlawfully withheld and diverted from said persons intended to be defrauded.'

And I submit to you, gentlemen, that the record is replete with evidence which showed that through their actions these defendants caused a situation to prevail wherein the security holders obtained less than the real value of their securities.

Mr. Lawson: I take exception to that remark, your Honor, and assign it as prejudicial error; that the jury be instructed to disregard it. There is no evidence in this case, either as to the actual value or the market prices of the securities.

Mr. Irwin: I join in that exception, your Honor, and I assign it as misconduct.

The Court: Will you read the statement, please?

Mr. Butler: Your Honor, on behalf of the defendant Cronk and on behalf of the Defendant Twombly I join in that citation of error.

The Court: Read the sentence, please."

(The record referred to was read by the Reporter.)

"The Court: The objection will be overruled. The jury are instructed that counsel is arguing the evidence as he sees it, and he is simply, in effect, saying to you—and I shall ask him to correct me if I am not stating him correctly—in substance that the various items of evidence, which have been produced before you, indicate

that the situation was caused whereby these people intended to be defrauded, and other persons indicated in the indictment, were not able to get as high a price for their securities in the sale of them as they would have been had it not been for the activities of these various defendants.

Mr. Campbell: Yes, your Honor. I thought in substance I so stated.

Mr. Irwin: Recognizing my responsibility, may I respectfully take exception to the Court's statement? I feel that I should assign the statement as error, if I may, at this time.

The Court: You may.

Mr. Lawson: I will join in that exception, your Honor."

XIX.

Said District Court erred in permitting the plaintiff, during the course of its opening argument, to make the following improper and prejudicial statement:

"Mr. Campbell: Gentlemen, I am going to take a short period of your time when we resume again, which I understand will be Tuesday morning. While I want you to understand, as has been told you from time to time throughout this case, that the plaintiff believes that in fairness to these defendants you should not make up your minds in this case until you have heard all of the arguments, until you have heard the instructions of the Court, and the matter has

been submitted to you; nevertheless, it is entirely proper, I believe, for you to consider these facts to yourself, that have been produced here in evidence before you, and I hope that each one of you, during this week-end, if you have the opportunity and time to do so, will think over to yourself the matters which I have called to your attention today: matters which are here in the evidence of this court, matters which stand on the record of this court; and, particularly, those matters in which there has been no contrary proof.

Mr. Irwin: If your Honor please, I wish to assign that last statement of counsel, directed to the jury, as prejudicial misconduct.

Mr. Lawson: I will join in that, your Honor.

The Court: Assignment denied; exception allowed."

XX.

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wished.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is

located, or you may want to branch out and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I have just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So, you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no' says he, 'Look down here in para-

graph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, your Honor—

The Court: And it has been relied upon in argument of nearly all of defendants' counsel

in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan."

XXI.

Said District Court erred in overruling the objections and exceptions of the defendants to certain questions propounded to the plaintiff's witness Bruce on direct examination and permitting said witness to answer as follows:

"Q. Will you state by years the principal amount of bonds acquired by First Security Deposit Corporation, segregating those amounts into first, the total face of bonds acquired, the total amount of bonds discounted; first, as to the face, or principal amount; secondly, as to the amount paid for such discounted bonds; thirdly, as to the average rate paid; stating

the face amount of bonds received on loans or escrows; stating in addition the bonds paid off by First Security at 100 per cent during the course of such year and during such periods or years as bonds were acquired from the Investment Finance Company; stating the figure or price at which received; stating whether or not they were received in exchange for real estate, in exchange for trust deed, or applied on principal or interest on debts owing from the Investment Finance Company to the First Security Deposit Corporation; and stating in addition thereto any interest added to the face amount of such bonds and allowed to Investment Finance Company.

Mr. Lawson: Your Honor, it is rather a long question to anticipate every part of it. There is no objection, of course, to the face amount of the bonds acquired, nor as to the statement of the amount by years. There is an objection to the statement of any amounts acquired at discounts unless the discount is with reference to the market prices. That is a discount below the market prices as alleged in the indictment. The same would apply to the average amount of discounts, unless the average amount of discounts would be those discounts below the market price or prices; not within the issues of the case; it is immaterial.

The Court: Read the question.

(The question referred to was read by the reporter)

* * * * *

Mr. Lawson: The objection is that any statement by this witness or any evidence relative to discounts or any related matters involving discounts is immaterial and incompetent, and not within the issues of this case unless it be shown that the discount or discounts were below the market prices as referred to in the indictment, and particularly on page 4, the third paragraph from the top; that is, unless it be shown that the discount was from the market price, that it has no place within the issues of this *place* in any Count of the indictment. Any other discount is not alleged as part of any scheme.

Mr. Campbell: Possibly there is some confusion in the use of the word 'discount.' My use of the word in the question to the witness is as to the difference between the price paid as disclosed by the books and the face amount of the securities, and I will reframe my questions so that that word is eliminated and in connection with the indictment which alleges that the defendants did depress and cause to be depressed the market price of the said securities of the First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.

This evidence is going to the acquisition at a price less than the par value thereof, and

not as to the first portion as to their actual depressing or causing to be depressed.

I think that statement will probably clarify the use of the word 'discount' to which counsel's objection is apparently addressed.

* * * * *

The Court: Well, may we not take the question as it has been read, which seems to be clear, with the added feature that the discount is the discount below the face of the bonds to which he is referring, and then your objections would be pertinent.

Mr. Irwin: * * * I join in the objection of Mr. Lawson, and add the additional objection which I made a moment ago, and I likewise wish to add the further objection that it is hearsay as to the defendants, if I didn't mention that before, and no foundation has been laid."

(The following proceedings were had between court and counsel.)

"Mr. Irwin: I am directing my attention to paragraph 3 page 4, directing my attention particularly to the objection as to the immateriality and the lack of foundation. The other objection is hearsay. They require no comment at this time as they go under the regular subject that has come up, properly subject to a motion to strike.

Your Honor will note the phrase there, I respectfully submit that is conjunction: 'De-

fendants did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof.'

I submit, your Honor, that we have no evidence, there hasn't been a single item of evidence, tending to support the first part of the conjunctive statement, namely, that they did everything, at any place along the line, to cause these to be depressed.

I submit, therefore, your Honor, that it then is immaterial. The mere fact that the bonds had a face value of \$100 and might have been bought for \$40 itself does not tend to prove or disprove any of the issues set forth in that conjunctive allegation.

The Court: That was the thing that I wanted to bring specifically out into the record because of the wording of this indictment and the wording of the question.

It seems to me that there are two necessary phases of proof in that paragraph in the indictment. If it could conveniently be done to put the first in first, that would be all right, but I don't see that there is any particular necessity for it so long as it comes forward before the end of the case.

The first element is 'That the defendants did depress and cause to be depressed the mar-

ket price of the said securities.' That is the first element.

The second element is they did that 'so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value.'

Now, both elements have got to be proven.

You see that 'did' is the element in there. The Government has got to prove that they did because they have alleged that they did and this is the proof.

Mr. Irwin: I appreciate that the Court does have in mind unless we get that first allegation there——

The Court: That is an important allegation in the indictment, and proof will have to be coming in to connect those two together in order for the Government to make its case, and then if they don't, you can move to strike.

Mr. Irwin: Then the ruling is the question is considered as still being in the record so these objections may not be repeated.

* * * * *

Then do I understand, your Honor, that the question is reinstated, as originally stated by Mr. Campbell with the deletion of the phrase 'discount.'

The Court: With the explanation of what he means by that phrase.

Mr. Irwin: That is still before the Court.

The Court: That is right.

Mr. Irwin: And the objections made by Mr. Lawson and myself and Mr. Adams to that question are overruled and exception allowed, subject to the motion to strike.

The Court: That is right. As to all defendants.

Mr. Lawson: I might state my position with reference to that is that the price at which the bonds were acquired must necessarily be below the market price.

The Court: Ultimately they have got to prove that under their indictment there, either by direct or other evidence, but there are two elements to this, and this proof is directed to the second element of the third paragraph on page 4 of the indictment.

Mr. Campbell: We are only proving the ultimate fact of the price at which they were acquired by this witness, not what the market price was or should have been.

* * * * *

Mr. Irwin: I overlooked one additional point, so that the Court will have it in mind. In connection with the objection of immateriality, that phrase in the indictment is 'So that defendant might and did acquire.' All this testimony is going to show what the First Security acquired as a corporation. I think counsel will agree that this question does not call and will not develop an answer that any of the defendants acquired the shares.

The Court: It says 'directly or through the

agency of one or more of said companies and through the agency of companies whose names are to the Grand Jurors unknown.' There is that limitation as to companies.

That objection will also be overruled subject to the same objection and same ruling.

Mr. Irwin: So we won't have to interrupt again, I am anxious to have this come in as coherently as possible, might it be understood that the objection runs to the whole line of testimony and need not be repeated?

The Court: Yes.

Mr. Campbell: So stipulated.

The Court: Now the question with the explanation and the objection will be re-instated, and you may answer."

Whereupon the witness testified with respect to the result of his examinations for each of the years 1932 to and including 1939. Whereupon the following question was asked and the following answer given:

"Q. Mr. Bruce, will you give us a total of the figures which you gave heretofore from the period November, 1932, to December 31st, 1939?

A. Total face value principal amount to bonds acquired amounted to \$1,267,649.15, of which amount discounted bonds at a face principal amount of \$648,125.02, for which the First Security paid \$238,069.35 for an average rate of 36.7 per cent. That is to say, 36.7 per

cent of the face amount of such bonds. Bonds received on bonds, or escrow, at one hundred per cent amounted to \$189,508.59. Bonds were paid off one hundred per cent \$195,571.40. Bonds received from the Investment Finance Company for the following purposes: the cost bonds leaving a principal amount of \$6,495.85 for which Security paid Investment \$3,036.79. In exchange for real estate bonds leaving a face principal amount of \$21,511.38. In exchange for First Trust deeds bonds leaving a principal amount of \$49,996.81.

Bonds acquired on the debt or interest due First Security, \$162,925.95. Interest added to bonds traded for first trust deeds are applied on the debt or interest due on the debt in the amount of \$36,217.25."

The witness further testified: The total face amount of bonds acquired by First Security in the summer of 1934 amounted to \$22,504.79; of this amount, discounted bonds had a face principal amount of \$21,332.06; for which the First Security paid \$6,565.42 for an average rate of 31 per cent. Bonds received on loans or escrow 100 per cent amounted to \$1,172.73.

Thereupon, over a similar objection, ruling and exception, the witness was similarly permitted to answer the following question with reference to the Investment Finance Company as follows:

"Q. Mr. Bruce, will you state by years the face value of bonds of the First Security De-

posit Corporation acquired by the Investment Finance Company; the amount of cash paid therefor by the Investment Finance Company; and the average rate applied; that is to say, the average of the face value for which they were acquired; the amount of interest added thereto while in the possession of Investment Finance Company; stating also the disposition of such bonds by the Investment Finance Company, and in such connection stating the face amount of bonds turned over to the First Security Deposit Corporation; stating the cost to Investment Finance Company; the application made of such bonds; and the total paid or allowed Investment Finance Company by First Security Deposit Corporation for such bonds; and state the figures slowly, if you will, so that counsel may follow you."

The witness was then permitted to state the aggregate figures for the period of 1935 to and including 1939 as follows:

"Q. Will you state, Mr. Bruce, the total face amount of bonds of the First Security Deposit Corporation acquired by the Investment Finance Company during the existence of that company? A. \$240,929.99.

Q. And what amount of those bonds were purchased at a price less than the face amount thereof? A. \$232,889.33.

Q. What was the cost to Investment Finance Company of that \$232,889.33 worth of bonds? A. \$169,672.09."

XXII.

The said District Court erred in overruling defendant Edgerton's motion to strike the testimony of said Plaintiff's witness Bruce referred to in the foregoing assignment of error No. 21, at the conclusion of all of the evidence in the case, upon the following grounds, that the same is:

- “1. Hearsay.
2. Incompetent.
3. Not binding upon the defendant Edgerton, nor connected with him.
4. Containing statements of matters not involved within the issues of the case.
5. Statement of opinion and not of fact.
6. Statements of summaries based in part upon immaterial matters, while purporting to be a summary of facts based upon material matters.
7. Insufficient foundation.”

That in this connection said written notice of the Defendant Edgerton recited the following:

“We also call to the attention of the Court that the summaries of Mr. Bruce, particularly with reference to discounts and profits and loss, are based upon a discount from the par value of the securities, and not on a discount from the market prices thereof.”

And exception was duly noted to the court's ruling in denying said motion to strike.

XXIII.

Said District Court erred in sustaining the objections of the plaintiff propounded to the Plaintiff's witness Kate O. Wright on cross examination as follows:

"Q. Calling your attention to Government's Exhibit 145, which is a letter dated March 30, 1937, that in part reads: 'We now have available funds with which to purchase First Security Deposit Corporation bonds and for a limited period will pay the best cash market price available to any who desire or need money at this time for current needs or other investments.'

After the receipt of that letter, did you make any effort to determine what was the market price of those securities?

Mr. Campbell: Objected to as incompetent and improper cross examination, and immaterial. * * * Assuming that investigation was made and that it either did or did not, as far as her investigation was concerned, disclose the truth or the falsity of that representation, that would not only be hearsay, but it would not in any degree reflect upon either the guilt or innocence of the defendants here.

Mr. Lawson: I am bearing in mind the announced purpose that counsel made to your Honor for the introduction of the correspondence, what he intended to prove by that correspondence.

Mr. Campbell: Yes. My announced purpose

is to show that the statements made to this witness were false, but any investigation or hearsay which she obtained, proving or disproving its falsity would not be a material element and it certainly is not proper cross examination.

The Court: Well, I follow your reasoning and I am inclined to agree with you on the last objection as not proper examination. I won't say what position I will take as to the other matters when they come in as part of the defense.

Even so I think this particular question is proper on cross examination, this one that she may answer yes or no. Will you please read that question once more?

You may answer that question as yes or no: Did you make any investigation?

The Witness: I believe not.

By Mr. Lawson:

Q. Did you consult Mr. Richmond with reference to that matter as to market price?

Mr. Campbell: I object to that as incompetent and immaterial.

The Court: Objection sustained as not proper cross examination."

(To which ruling of the court, the defendants duly took an exception.)

"Q. Now, I call your attention to Government's Exhibit No. 146, which is a letter dated April 8, 1937, addressed to the Investment Finance Company. This is a copy, but bearing

a signature, or a typewritten name, 'Kate Orwall Wright,' and call your attention to this part of it. I will read it in its entirety as it is short:

'In reply to your letter of March 30th, regarding the First Security Deposit Corporation stock, will you kindly advise me what the best cash market price is for this stock at the present time?'

Now, I call your attention in connection with that letter, to the further letter, Government's Exhibit 147, dated April 13, 1937, which reads as follows:

'With reference to your letter of April 8, 1937, please be advised that we can enable you to procure the sum of \$619.94 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-9344.'

Now, I will ask you if upon the receipt of that letter, dated April 13, 1937, Government's Exhibit 147, that that satisfied your inquiry as to the market price.

Mr. Campbell: Objected to as incompetent and improper cross examination.

The Court: The objection is sustained. The letter speaks for itself."

(To which ruling of the Court, the defendants duly took an exception.)

"Q. Calling your attention to Government's Exhibit No. 152, which is a carbon copy of a letter dated August 9, 1938, which is addressed

to you and signed by the Investment Finance Company—this is the letter of the offer of \$662.65—now in response to that letter you sold your bonds for that price, is that correct?

A. Yes.

Q. And you got the money and surrendered the securities? A. I did.

Q. Now at that time did you have any information or independent knowledge of your own as to the market price of those securities?

Mr. Campbell: Objected to as incompetent, improper cross examination.

The Court: Objection sustained."

(To which ruling of the Court, the defendants duly took an exception.)

Said witness Wright on direct examination testified that she was the owner of Certificate A-934, 11 shares of Class A Preferred stock of the face value of \$220.00 and a cumulative bond A-6721 of the face value of \$854.20 of the First Security Deposit Corporation; and identified Plaintiff's Exhibits 144 to 152, respectively, as letters either received by her from the Investment Finance Company or written by her, or under her instructions, to the Investment Finance Company. With respect to the offer of these letters the plaintiff stated that these letters were

"offered to show that this course of relationship had been established between the company and the witness who is on the stand and which offers were made from time to time of

varying amounts for her stock and certificates."

Plaintiff's Exhibit 145, a letter from the Investment Finance Company to the witness recited that the company had available funds with which to purchase First Security Deposit Corporation bonds and would pay the best cash market prices available to any who desired and that changing market conditions may affect a quotation and that the offer would remain open only for such time as the Investment Finance Company was able to meet the demands under current conditions; Plaintiff's Exhibit 146 is a letter from the witness in reply reciting:

"Will you kindly advise me what the best cash market price is for this stock at the present time."

Plaintiff's Exhibit 147 was an answer to Exhibit 146 and recited:

"Please be advised that we can enable you to procure the sum of \$619.00 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-934."

Plaintiff's Exhibit 151, dated July 5, 1938, recites:

"We are able to this time to return to you \$640.65"

for Bond No. A-6721; and Plaintiff's Exhibit 152, dated August 9, 1938, to the witness recites:

"Replying to your letter of August 6, 1938 regarding securities of the First Security De-

posit Corporation, Bond No. A-6721 * * * and Certificate No. A-934 * * * we can obtain for you a total of \$662.65 for the bond and preferred stock."

The witness further testified on direct examination that after she had received the above correspondence she finally sold her securities to the Investment Finance Company for \$662.65.

XXIV.

Said District Court erred in sustaining the objections of the plaintiff to certain questions on cross examination propounded to the Plaintiff's witness George U. Richmond. On direct examination the witness testified he was vice-president of the American National Bank of St. Joseph, Missouri. The witness was then asked on direct:

"Q. Mr. Richmond, as vice president of the bank, did you have occasion to represent Mrs. Kate Orwall Wright in a matter with reference to her securities in the First Security Deposit Corporation?

A. I wrote several letters in her behalf."

The witness further testified that Plaintiff's Exhibit 153 was a letter written by him addressed to the First Security Deposit Corporation under date of July 19, 1938 reciting that one of the customers of his bank held Bond No. A-6729 and Certificate A-934 and inquiring if she should sell the securities on the market at the present time, and "Can you tell us about what she should receive for them";

the witness further testified that Plaintiff's exhibit 155 was a letter addressed to him from the First Security Deposit Corporation dated August 3, 1938, which said letter was a letter replying to the witness' letter under date of July 19, 1938, reciting that "we understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock."

The witness testified on cross examination that he was acting for Mrs. Wright in connection with this matter; that in a sense he was her financial adviser; that he talked to her about this transaction; in answer to the question of whether he had made any independent investigation as to the matter, he said: "I wrote several letters to California banks, to Los Angeles banks".

Then the following occurred on cross examination:

Q. You have stated here that in reference to this letter of July 19th, which is Government's Exhibit 153, that you were advising Mrs. Wright in reference to this matter, the matter of the sale of these securities?

A. I said I discussed it with her. I don't know that I gave her any advice as to what to do.

Q. And you said you wrote the letters to Los Angeles banks? A. Yes, sir.

Q. Inquiring, I presume, as to the value?

A. As to the market; yes.

Q. And did you get some replies on that?

A. I did.

Q. Do you have any of that correspondence with you?

A. I don't have it personally. It might be here. I don't know.

Q. You don't know where it is?

A. We have a folder. I think perhaps it is in the hands of the Government."

The witness was asked whether he had any independent recollection as to what information he received from these banks with reference to the sale of these securities, to which the plaintiff objected on the grounds that the same was incompetent and improper cross examination; said objection was sustained, to which ruling of the court the defendants noted an exception.

The witness was then asked after receiving those letters from the banks if he advised Mrs. Wright further with reference to the sale of these securities, to which question the plaintiff objected on the grounds that the same was incompetent and improper cross examination; said objection was sustained, and to which ruling of the court the defendants took an exception.

The witness was asked if after receiving the letter of August 3rd, plaintiff's Exhibit 155, that he gave Mrs. Wright any advice with reference to the contents of that letter; and objection was made that the same was immaterial and sustained by the court, to which ruling of the court an exception was noted.

XXV.

Said District Court erred in admitting into evidence over the objections and exceptions of the defendant plaintiff's Exhibit 46 in full for the purpose of showing that the information contained in said Exhibit was communicated "To certain individuals" in order that the jury "may use that as an element to determine the intent with which the various acts were done" by the various defendants, and in denying the motion of the defendants made at the close of the plaintiff's case and at the close of all of the evidence in the case, to strike said Exhibit and exclude the same from consideration by the jury; and in overruling defendants objections to and in denying his motion to exclude that portion of said Exhibit 46, which contains the comments, opinions and conclusions of the author of said Exhibit, as distinguished from the audit contained therein, from the consideration of the jury.

Said Exhibit 46 consists of a letter and an accompanying report by certified public accountant under date of February 25, 1939, to the Investment Finance Company respecting the examination of the accounts of said company, as of December 31, 1938; said report recites as follows:

“Comments.

Cash

Cash on hand was counted and reconciled to December 31, 1938, and the bank accounts were confirmed by letter and found in order.

Accounts Receivable.

The accounts receivable are presented in detail on Schedule I and total \$2,038.69, consisting largely of insurance premiums uncollected by the Wilshire Insurance Agency.

Contracts Receivable.

Contracts receivable as per Schedule II are automobile sales contracts. They are presented on Exhibit A at book value, although more than 50% of the dollar balance at December 31, 1938 have been pledged with the American National Bank of Santa Monica as security for a loan which at that date amounted to \$8,700.00.

Notes and Loans Receivable.

Of a total of \$48,413.27 in notes and loans listed in Schedule III, \$37,400.00 is unsecured. In fact, the largest single note of \$16,650.00 is signed by Battelle-Dwyer & Co. which, it is understood is no longer in existence.

Investments.

Schedule IV is a presentation of the securities into which the company has put most of its funds, obviously more for purposes of control of the various companies concerned than for income from the securities themselves. Most of the investments have been in the common stocks (or voting stocks) of the various companies upon which little or no dividend income has yet been realized.

Pledge Agreement—California Federal

Savings & Loan Securities

The item of securities owned in the Cali-

fornia Federal Savings and Loan Association which is carried at \$15,000.00 is subject to a pledge agreement of the liquidated Consolidated Investors Corp. with one F. E. Jones, and is secured by the deposit with this company of the following shares of stock in this company.

W. S. Brayton (has not been assigned to Investment Finance)	5,000 shares
R. W. Starr	2,500 shares
A. R. Ireland	5,000 shares
J. H. Edgerton	1,666 shares
F. A. Anderson	1,200 shares
Ed C. Thomas	1,160 shares
<hr/>	
Total shares Hypothesized	16,526 shares

The above listed individuals are all the endorsers of the said pledge agreement. This agreement apparently was originally intended to terminate on July 23, 1939, but it should be noted that there was a typographical error on the agreement itself so that it actually reads July 23, 1936.

Deed of Trust—Pacific Brick Co.

Interest has been accrued to August 1, 1938 on a first trust deed on all the property of the Pacific Brick Co., which was the approximate date of acquisition by this company.

Real Estate.

The real estate shown on Exhibit A at \$5,608.19 consists of a house built for resale. It is mortgaged to the extent of \$3,673.18 as shown under First Trust Deed Payable.

Accounts Payable—First Security Deposit Corporation

This account has gradually been built up to its present figure over the past three years by numerous advances from First Security Deposit Corporation on open account without security. Interest has been paid at the rate of 3 per cent per annum, but this interest has been paid in bonds of the First Security Deposit Corporation at face value, thus reducing the effective interest rate because all such bonds purchased by this company have been acquired at a substantial discount.

Inter-locking Schedules.

Schedules V and VI respectively, show the inter-locking stockholders and directors of the eight related companies. Schedule V is presented on transparent paper so that the two charts may be considered either jointly or separately. Only those stockholders or directors are included on the charts who are connected with two or more of the companies involved.

Schedule VII presents inter-company financial *objections* with amounts. The broken lines indicate unsecured obligations and the solid

lines indicate obligations which are either fully or partially secured.

General.

With reference to the 'Noon deal' mentioned on page 2 of comments, no attempt was made to verify the present status of the note or pledge agreement. It would appear to be a doubtful asset at best. It is also possible that the manner of showing the account as Savings and Loan is questionable since probably all the Investment Finance obtained was an agreement or contract rather than the shares themselves.

Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) is any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlocked as to appear identical in effect (see Schedules V, VI and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the former company; and (3) funds used to promote the

various enterprises were basically the funds of the First Security Deposit Corporation.

These questions, then, should be answered, and do they constitute fraud:

(a) The purchase of First Security Deposit Corporation bonds at a discount, and the re-sale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to others?

(b) Taking over the Wilshire Insurance Agency, and diverting commissions formerly earned by the First Security Deposit into the income of the Investment Finance?

In addition to these questions there might be raised the more general one of whether, since in acquiring funds from Security—which funds were in most instances profitably invested—the re-investment in such mismanaged enterprises as Bonds-17, for example, might on its face be construed to be fraud and mismanagement regardless of the answers to the hypothetical questions propounded above.

It would also appear that perhaps in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact, and still further, might bring the company under the S.E.C. because they were sent through the mails out of the state.

In summarizing, it would appear that it

might be difficult to justify legally, the existence of the company in any particular, as it is now operating. As your auditor, I wish merely to direct the above matters to your attention, realizing that you have no doubt considered them before."

The grounds of said objections and motions to exclude were:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters in agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant; for the reasons,

(1) The same has not tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment;

(2) That there is no evidence that the defendant Edgerton had knowledge of said report, and that portions of Exhibit 46, as distinguished from the audit itself, are mere comments, opinions and conclusions by the author of said report, and hearsay.

5. During the course of the reading of said Exhibit to the jury, the Court made the following comment:

“The Court: * * * This is being introduced, as I understand the position of the plaintiff, to show that this information was communicated to certain individuals. * * * In order that you may use that as an element to determine the intent with which the various acts were done by these various defendants.”

At the conclusion of said reading to the jury, the Court made the following statement:

“Now, gentlemen, I again want to caution you that you are not to consider that audit report (or the minutes) for the truth or falsity of what they contain other than the showing that is indicated, the minutes, that this document was discussed. It has been introduced and been accepted only to show the intent or as one of the elements of intent together with other things that may be introduced during the course of the trial, and you are to keep your mind open even on that element.”

XXVI.

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell's (Plaintiff's Exhibit 46) and in his reference to it he says this: 'There is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed on this document, that the document itself is not to be considered by you as proving or disproving any of the facts or statements—strike out the 'facts'—any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see. Mr. Dean Campbell starts out to say here, and he propounds certain questions—

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up. Now, am I right or am I wrong.

Mr. Campbell: No you did not Mr. Lawson.

The Court: I remember you making the

statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

'Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.'

Now, to me, it is sort of a bit of sophistry, shall I call it, to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his

statement. Now, may I proceed, your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now, Mr. Campbell proposes to show the jury that there is something in the record to

substantiate at least some of the charges, and I see no impropriety in it.

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

'Now, that brings us to a couple of documents that are in evidence. Gentlemen of the jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you would honestly and sincerely respect the limitation and the instructions of the Court with reference to those documents,

because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made.'

Now, you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean Campbell.

Mr. Lawson: That would seem to follow, your Honor—I agree that that is true—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing

in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose and object to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception to that?

Mr. Lawson: Yes, your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report.

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen: I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it.

'Possibly the matter of utmost importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co., is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the for-

mer company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.'

Now, referring to that document Mr. Lawson has said:

'I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct violation of your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, your Honor.

The Court: The exception will be disallowed."

XXVII

Said District Court erred and was guilty of conduct prejudicial to the defendant in suggesting and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same, as follows:

(A) The plaintiff's witness, Frank E. Morgan, testified that he was a deputy county clerk of Los Angeles County and that he had produced the articles of incorporation of the First Security Mortgage Corporation, and amendments thereto, from the official records and files of the County Clerk's office.

"Mr. Campbell: This file, being file No. 51694 of Los Angeles County, being the articles of incorporation of the First Security Mortgage Corporation, together with amendment of said articles changing the name thereof to First Security Deposit Corporation, the original articles having been filed November 25, 1931 and the amendment thereto being filed July 25, 1932, it will be offered as Government's first in order.

Mr. Irwin: I think, your Honor, for the purpose of objection until counsel can examine it, in the interest of time it should be marked for identification at this time and we can examine after the recess. We must, of course, ask leave to examine it before it is received.

If he would just content himself about marking it for identification at this time we could examine it as soon as we conclude here.

Mr. Campbell: May it be marked for identification at this time?

The Court: I am not in the habit of wasting the time of the Court and the jury on examinations of documents. If anybody has any document or record that they intend to produce in evidence, I want them to notify the other side and during the recess or at odd times have them examine it. I will not stop a trial to have any such documents examined. Those must be examined during a recess and not waste the time of the jury. I caution all of you, if you intend to introduce any documents in evidence that are matters of public record, unless you show the Court in advance that the revelation of that will be prejudicial, to show them to the other side in advance and have it stipulated to.

And now, clearly, there is nothing secret about these articles of incorporation and the amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes.

The document will be marked for identification. And I hope by a stipulation the first thing in the morning it may be received in evidence.

(The file referred to was marked as plaintiff's Exhibit 1 for identification.)

The court thereupon made the following statement:

The Court: Very well. Let's proceed. We have a lot of things to take care of without a lot of technicalities. And when a document of that kind is introduced in evidence and shows later it is spurious, it, of course, can be corrected. I am not going to waste the time of myself and the time of the jury while a lot of technical objections that are of no value, except to take the time of the Court and jury, are entered into.

Proceed."

(B) Upon plaintiff's witness Milton Shaw, being sworn to testify, the Court made the following remarks:

"The Court: I think possibly before we start in with this case that I ought to explain to counsel and to the jury what my position will be uniformly in connection with this case in order to save a lot of time.

As I have said in a statement previously in this trial and just immediately, that it is impossible for the Government or for the defendants to prove everything at one time, and it is impossible for proof to be made in either a chronological order or a logical order sometimes because, while the witness is on the stand, instead of recalling him several different times to get matters in either in chronological or logical order, it is better to take all of that which is his testimony and be done with it.

Now in a conspiracy case seldom is it possible to have direct evidence. Sometimes it is as to

parts, and sometimes not. The conclusions have to be arrived at by a series of happenings, what I described in part at least as circumstantial evidence.

Now the admission or non-admission of testimony as it is presented by the Government is largely within the discretion of the Court in the exercise of careful, cautious judgment to protect the rights of the defendants. * * * So as to not waste the time of the jury by having them listen to evidence which I am later going to have to strike, where I feel, from my knowledge of the facts made here and my experience in trying conspiracy cases, that the offer is made in good faith and that there is a reasonable ground to believe that it can and will be properly connected up, I shall admit it, reserving to counsel for the defendants the right at the conclusion of the Government's case to move to strike any evidence which has been admitted but which has not been properly connected as to being binding upon all of the defendants or as to be binding as against a particular defendant on whose behalf the motion is presented to the Court. * * *

* * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the Court and jury to make the objection that the evidence is being put in out of order, and that the conspiracy hasn't been yet proved, and so on and so forth, where I am reserving to them the right to strike. * * * The

only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. I am going to give you a right, if it isn't properly connected up, to move to strike that particular evidence.

* * * * *

If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the Government to go *and the* witness back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a technical point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to anyone except the delight of the lawyer to make technical objections and have them sustained.

Mr. Irwin: With all deference to the Court's remarks—I quite agree with your Honor as to the fact that a record is a record of the State—but what that record may contain, I don't know. We have never seen it. It can very

properly accuse somebody that had no relation with this case of the most heinous crime if he sat silent and didn't let counsel note an objection and then in argument read it to the jury.

The Court: Now manifestly it isn't fair, nor is it proper, to bring a whole set of records of the State Corporation Department and expect to have them introduced in evidence without counsel for the defendants having abundant opportunity to examine those records and determine exactly what they contain, because it isn't a question as to whether authoritative records, it is a question of whether they contain matter which may be entirely immaterial, may be scandalous, may be prejudicial, may be hearsay, may be collateral, may have absolutely no bearing upon the trial of this case.

* * * * *

You should have an opportunity to examine those and any other documents that are going to be submitted so that we may not have to take the time of the Court and the jury to do it in the court room.

Now they are not yet admitted, and I shall charge you with examining them within a reasonable length of time so that if they are proper they may be admitted in evidence. If they aren't proper, they may be excluded.

You may proceed."

(C) "The Court: Of course, I don't think the Government is required to earmark their testimony as applicable to anything. If it is admissible, it goes in, and it is up to you on cross

examination and on argument before the jury to show that it is not applicable to your particular client or to particular situations.

I see no way, unless we are going to be here to celebrate Christmas and New Year's, to do it otherwise than to get these books before the Court and get them in.

Now, they are there. You can cross examine as to them. You can subpoena these witnesses and bring them in as a part of your own case on defense, if you wish. If there has been any misrepresentation, or if there are signatures or anything of that kind that aren't genuine, all you have to do is to establish that fact and we will strike them out.

But I shan't stay here until Christmas to satisfy a lot of technical niceties. I want to get this evidence in, get it in a way that will be protective to the defendants, but we have to get the evidence in and you must put it in piece-meal and you can't put it in either chronologically or logically in conspiracy cases, as I see it. * * *

Mr. Irwin: * * * If the Government is allowed to dump in the whole thing, then the burden is placed upon the defendants to prove their innocence instead of on the Government to prove their guilt. * * *

The Court: Of course, I can't follow you there at all, because the mere fact that this evidence is in, the jury hasn't seen it, the jury doesn't know what is in there, and it is a long

time before they are going to see it. In the meantime you have your right of cross examination, and if these records, after your examination of them, prove to be immaterial or incompetent or not available as evidence, we will strike them out. But we can conceivably, with five or six technical lawyers, take three weeks on one book. That is just exactly why the Congress decided to get rid of these ultra-technicalities of the admission of books and records of corporations and entries in them.

I have seen technical lawyers keep a court going for three weeks on getting in one book. That has been in the past quite a common experience."

(D) "The Court: I am going to go over this again, and I am going to do it for the final time because I am not going to keep on repeating it.

The way I propose to permit this case to go in—and I shall have due regard for the rights of these defendants—this case cannot all be put in at one time. That is very manifest. It covers many defendants, many transactions, many years, many books, many records. Now, I am not at all sympathetic with the position that it is very harmful before this jury because the jury don't know anything about what are in these books, and certainly no harm can be done.

I am not sympathetic with any surprise with regard to it. It is inconceivable to me that

lawyers would prepare a defense in this case without going to the records of the State Corporation Department and the Building and Loan Commissioner and finding out what they contain. I don't propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * *

* * * Now I recognize that you gentlemen are retained to defend your clients, and you are doing the very best you conscientiously can to protect their interests. There can be no doubt about that in the minds of anyone. I try to be fair to the defendants, as I am to the Government. I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the tricks in the bag by way of technicalities, and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren't getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State's office."

(E) "Mr. Campbell: If your Honor please, the element of time is not of singular importance to me in that I am employed on an annual salary, but I had not understood that there was going to be any question that these were not the books and records of the company, but as the Court can appreciate, it is going

to take us a great deal of time beyond our estimate of the time of this case if we have to prove the individual items, and produce the individual bookkeepers, where, as in the case of this witness, he does not remember certain entries or who made certain entries; and therefore can not say he made them directly.

The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, and kept in the regular course of business, and that it was the course of business, and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it." * * *

Mr. Adams: May I, on behalf of the defendant Twombly, offer this stipulation, which I think may save us a lot of time, that where the witness, without any waiver of the objections I have made or the benefit of the ruling—that where the witness testifies that he made a certain entry himself or a certain entry was made under his direction, that we eliminate the two questions and answers: 'Were these records made by you in the regular course of business?' and 'Was it the regular course of business to keep such records?' because that repe-

tition of that is taking time all of the time and I see no necessity for it.

The Court: Well, of course, that is supposed to apply to the entire group, but in order to be safe, counsel has been doing that.

Is that satisfactory to all of the defense counsel to have it so stipulated?

Mr. Irwin: Your Honor, you recall I offered that stipulation yesterday afternoon and Mr. Campbell said he didn't desire to accept it. It is still most satisfactory to me.

The Court: Is it satisfactory to you, Mr. Lawson?

Mr. Lawson: Yes, your Honor.

The Court: You, Mr. Butler?

Mr. Butler: Yes, it is, your Honor.

The Court: Very well. That stipulation will be received.

(F) The foregoing occurred during the examination of plaintiff's witness, C. Ernest Perkins:

"Q. I show you plaintiff's Exhibit 29, the general ledger of the First Security Deposit Corporation; and I will ask you to examine this book and state whether or not the entries made herein from the setting up of this ledger until the termination of your employment in December of 1934 were made by you or under your direction.

A. Yes. I would say that the original records from '33 possibly up to the last of March were made by me.

Mr. Campbell: Might the stipulation heretofore entered into be considered as applying at this point to this exhibit?

The Court: It may be so considered.

Mr. Campbell:

Q. I show you——

Mr. Irwin: Might I interrupt, if your Honor, please. Was that the last entry in that particular book, the entry at the end of March?

Mr. Campbell: It is not, your Honor. We will produce additional witnesses."

'The witness was shown plaintiff's Exhibit 30 for identification, the general ledger of the Realty Department of the First Security Deposit Company, and testified that he did not *hand* that book.

The witness further testified that plaintiff's Exhibit 31 for identification, a stock ledger, was kept by him, but that he did not know who set it up. That his best recollection is that it was set up some time in 1933.'

"Mr. Campbell: Might it be deemed that the stipulation applies at this point as to that volume?

The Court: It may be so considered."

(G) During the course of the examination of plaintiff's witness, Perkins, the following occurred:

"The witness further testified: That plaintiff's Exhibit 141 for identification, a letter dated February 27, 1934, is a letter which he sent or caused to be sent to the holders of col-

lateral trust certificate due May 1, 1934; that it was mailed or caused to be mailed on or about February 27, 1934. That the circumstances under which he sent and mailed that letter were the same as the previous letter.

'Mr. Campbell: May this be marked Exhibit 141 for identification?

The Court: It may be so marked.

Mr. Irwin: So I will be correct, counsel, are we jumping by 140?

Mr. Campbell: Yes.

The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions. These documents can be available from early morning until late at night, and counsel can check them afterwards, rather than waste our time during the session.' "

(H) At the conclusion of plaintiff's opening statement, the following proceedings were had:

"The Court: Now, gentlemen, it is quite apparent to the Court and the jury that there are a number of different corporations involved here. It may be a little easier for the Court, because of his particular training, to follow these transactions which I think, by the ques-

tions, I was able to do. I am not so sure that it was possibly quite as easy for all of the members of the jury. Some undoubtedly followed it just as well as did I, and possibly much faster.

I want to ask counsel for the plaintiff, and for the Defendants, and ask the jury, if it wouldn't be of great assistance to all of us to have counsel, that is, counsel for the plaintiff with the approval of counsel for the defendants, get up a chart and put these corporations' names down on that chart in large type and put it on easel so that we will have it up here all the time.

First, Railway Mutual Building and Loan Association. Now you can, if you wish, put the capital structure of that off to one side, at least put the date of its organization and possibly a separate sheet showing its capital structure.

Then, second, the First Security Mortgage Corporation, then the First Security Deposit Corporation, then the Realty Deposit, then R.F.D. Discount, then Consolidated Investors, then Investment Finance Company, and then the American Bank, American Building and Investment Company, the Bond 17 Dog Food Company, and so on, so we will have here all the time these names and we will be able to fit those particular corporations into the picture.

Now, wouldn't that be helpful to you gentlemen?

(Jury assents.)

Will you gentlemen prepare such a chart?

Mr. Campbell: Yes. I will be glad to.

The Court: With the assistance of counsel for the defendants.

Mr. Lawson: Yes.

If your Honor should consider that a number of those companies are pertinent to this case, I think it will be a very helpful suggestion, but I would like to be heard in argument as to the limitations that counsel for the Government here has gone into on the case which he proposed to submit.

I would like to present to your Honor the proposition that there are only three companies involved, that is, the First Security, the Investment Finance and the Railway Mutual.

Our position in regard to a great many of these matters that he has gone into, Mr. Campbell, are not relevant to the case and will only lead to confusion.

The Court: Well, it isn't going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the jury, they are going to ignore it, and that is that, and yet I think the continuity is there and that it would be very helpful to all parties to have them there.

We may not use all of them, but we may use some, and in any event, we will have the picture, and rather than being a detriment to the

defendants, I would think it would be helpful to clear the whole situation up." * * *

"Mr. Adams: I don't think we ought to put upon any chart the name of an individual or company in which any particular investment was made. In other words, I think the jury might be aided by showing the diversification from the Railway Mutual to the First Security and then from the First Security to the Investors Finance."

* * * * *

"The Court: But on this chart we have the original company, Railway Mutual Building and Loan Association, then the First Security Mortgage Corporation, which was its successor, or which took over certain assets. Then the name of that was changed to First Security Deposit Corporation. One of the subsidiaries of that, as I understand the remarks of counsel, is the Realty Deposit Company.

Mr. Lawson: Your Honor, that was a book-keeping arrangement on the books.

The Court: Regardless of that, the name will undoubtedly appear, and we will want to know where it fits in.

Then the R.F.D. Discount Company, an affiliated organization.

Now, then, Investment Finance Company clearly appears in the chain of circumstances. I don't know to what extent Consolidated Investors was discussed by the Government in the opening statement.

Mr. Campbell: It is simply the successor or name change of the R.F.D.

The Court: That is what I thought. That can be shown.

Now, then, the State Investors Corporation, I am not just sure as to that.

Mr. Adams: That, your Honor, is the place where I suggest your Honor stop. When we get to Investment Finance Company, that is the Company that Mr. Campbell has alleged for the Government loaned, or made unlawful loans to this, that and the other company.

The Court: I understand the State Investors Corporation, American Building and Investment Company, American National Bank of Santa Monica, Bond 17 Dog Food Company, Pacific Brick Company, and Pierce Petroleum Company, were companies entirely outside of the capital structure purview of these corporations.

Mr. Adams: Yes, sir.

The Court: They were corporations in which money was alleged to have been invested from time to time.

Mr. Adams: Yes.

The Court: All right. We will have no confusion then. Let's confine our first chart to these seven. We have the names, the dates of organization, and the capital structure."

(I) During the course of examination of plaintiff's witness, Clarence M. Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that is not the best evidence.

* * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours?

Mr. Lawson: May I make my position clearer with reference to that, your Honor? The use of a summary by an accountant is well recognized for financial matters, the figures, the bookkeeping; I understand that. I am objecting against this witness, who is qualified as an accountant, to testify as to what the minute books, the by-laws, or any other written matter that has been introduced here, as to what those records may contain.

* * * * *

The Court: The objection will be overruled.
You may answer that question.

Mr. Lawson: Exception.

The Witness: Seven, up to a certain date.

Q. Was that number subsequently changed?

A. Yes, sir.

Mr. Lawson: May my same objection run without repetition? With the understanding, the same ruling and an exception allowed.

The Court: Yes. I am only going to allow him, if you insist upon the objection, to ask for the number of directors, provided from his examination, with the understanding that if the information is not correct, for any reason, that counsel will have an opportunity to correct it, either on cross examination or by calling the Court and the jury's attention to the record."

The witness further testified: That the by-laws were amended subsequent to February 16, 1938, so as to provide for five directors of the First Security Deposit Corporation.

"Q. Mr. Bruce, as an accountant, did you also examine the charter and by-laws of the corporation, which have here been placed in evidence, for the purpose of determining what stock should be voting stock? Answer that yes or no.

A. Yes.

Q. And what did your examination disclose?

Mr. Lawson: Same objection your Honor.

The Court: The objection will be sustained.

Mr. Campbell: May I have Government's Exhibit 1, 9 and 18?

Mr. Adams: Your Honor, while counsel is examining that, might I call your attention to the fact that in the schedules the addition is incorrect?

The Court: The schedule has been objected to by Mr. Lawson, so that it is not of any moment to us.

Do I understand, Mr. Lawson, your objection goes to these charts so that the Government need not go to the trouble of preparing those charts? If you object to one, I understand you object to both.

Mr. Lawson: Your Honor, I don't object to what I consider the companies involved here, not the First Security and the Investment Finance Company, and the Railway Mutual.

The Court: Is this company not the First Security?

Mr. Campbell: It is the First Security.

Mr. Lawson: That is the First Security. I have no objection to any pictorial representation as to whatever the facts are with that one correction on the legend.

The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now, what is your position?

Mr. Lawson: My position is that I am anticipating this witness' attempting to summarize the minutes of the meetings of the Board of Directors to show certain facts. Now, so far as the number of directors, the capital struc-

ture, the stock issued, I haven't any particular objection to that. I am simply preserving my rights with reference to what I have anticipated will come.

The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.

Now, I want to know: What is your position. You either object or you don't object.

Mr. Lawson: I have tried, your Honor, to make my position clear in that I am not trying to be obstreperous or trying to consume time. I am simply as I stated to your Honor, anticipating what this witness is going to testify as to what may be contained in the minutes.

The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by

agreement of all counsel in order to save time. If you object to this witness' testifying as to what he has gleaned from these books, your objection then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the articles of incorporation, that portion of it dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation showing when there was an election and when there was a change."

(J) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you point out to me, Mr. Bruce, where that is contained?

A. (Examining book). (Pause)

The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made specifically and exception save at each point as to each defendant.

Mr. Irwin: * * * There are certain meetings, some of my defendants were not there, and some of them were. As to those that were there there is no objection * * * But it will be necessary for me to follow counsel, or to ask counsel in

reading to state if any directors were absent, and then interpose the objection of hearsay.

The Court: Yes, you will have to make a technical objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time; the stock that was outstanding, and so forth, and we have to go back to the original; so there will be no other way to it, than for you to make objection.

Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly.

Mr. Irwin: Very well, your Honor."

(K) "The Court: Now, the matters before the Court are the minutes of the stockholders' meeting of the Pierce Petroleum Corporation under date of February 19, 1937. That was just one, was it?

Mr. Campbell: Yes.

The Court: Exhibit 84. And the letter dated January 3, 1936 passing between Pierce Petroleum Corporation and Investment Finance Company. The Court rules that both of these documents are admissible to show intent.

You may now ask for a stipulation as to signature.

Mr. Adams: We wish an exception to the ruling.

The Court: You may have the exception.

You may ask for Mr. Adams' stipulation as to the signatures.

Mr. Campbell: At this time I will ask if it may be stipulated.

Mr. Lawson: For the purpose of the record may we have an exception?

The Court: Yes, it hasn't gone in. I will take care of that when the time comes. Give them numbers for identification now.

The Clerk: The letter will be plaintiff's Exhibit 180 and the minutes 181.

Mr. Campbell: Might it be stipulated that—

Mr. Adams: May I ask a question first? Your Honor, in admitting these minutes, your Honor is admitting them over the objection of no foundation?

The Court: No. It was my understanding that these documents which were being shown, signed by any of the defendants, that they were to be admitted on the stipulation of the signature, and I have been following that policy.

You said that you would now, if you ever entered into such a stipulation, withdraw from it and would insist upon the Court's first passing upon its materiality, and then you wanted it handed to you, and rather than require a

handwriting expert to prove Twombly's signature, then you would then determine what you would do about it.

Now, I haven't admitted this in evidence. I have simply ruled it is material on the question of intent. I have asked counsel to submit it to you, and ask you whether you are willing to stipulate.

Mr. Adams: I don't understand you frankly. I am at a loss. I said to your Honor that if your Honor admitted it in evidence—now, your Honor just said you are not. I don't know whether it is admitted, or whether it isn't. If it is admitted then it must be admitted for some purpose. What I am trying to point out, if your Honor overrules my objection of no foundation, if your Honor then overrules my objection of hearsay, if your Honor overrules my objection of not being material, if your Honor then admits it in evidence, then I will be glad to stipulate to the signature, but I want your Honor's ruling on the matter of foundation and other points.

The Court: You are asking the impossible. How can I admit a thing in evidence when there is no foundation laid so far as the signature is concerned?

What you just stated you had said wasn't what you said at all. You said if I would rule it was material, rather than put the plaintiff to the trouble and expense of bringing in handwriting experts, that you would then determine

whether you are going to yield and say that the signature of Mr. Twombly was genuine.

Mr. Adams: I felt, your Honor, this way, as your Honor well said to me the other day, foundation for a document may be laid in many ways.

The Court: That is right.

Mr. Adams: Foundation for this document is being laid in no way except through the signature of Mr. Twombly.

The Court: That is it, exactly. I have already ruled that no other foundation was laid and that other foundation will have to be laid insofar as the Defendant Twombly is concerned unless you are willing to stipulate that those are the genuine signatures of your client.

It cannot be admitted because no foundation has, as yet, been laid as against your client.

Mr. Adams: I won't stipulate to anything at the present moment then under the ruling, and I take an exception to the ruling.

Mr. Campbell: If your Honor please, may I withdraw these two exhibits from the identification numbers?

The Court: Yes. Just leave the identification numbers on them.

Mr. Campbell: May I withdraw or take with me the two exhibits?

The Court: You may take them out of court.

Mr. Campbell: Now, I wish to read from the minutes of the Investment Finance Com-

pany. Might I state, your Honor, that the statement I made just prior to the noon recess that the evidence now being offered is being offered as to all defendants with the exception of the Defendants Twombly and Cronk still apply?

The Court: Before we go into that, I think I want to explain my ruling. Maybe I haven't made it clear.

These minutes and a letter to which I alluded were offered in evidence. There was no foundation laid for their admission by having anyone take the stand and show that they were the records of the corporation kept in the regular course of the business and that it was the habit of the company to keep records of that type.

In the absence of that foundation the documents were, regardless of how I felt about their materiality if admitted, they were not admissible unless they could be admitted under the stipulation which we have heretofore had, * * * counsel making the point that no proper foundation was laid, and refusing to take any position as to signatures, they cannot at this time be admitted without a further foundation as to the defendant Twombly.

As to the defendants represented by the two attorneys, they may be admitted under the stipulation."

XXVIII

Said District Court erred and was guilty of con-

duct highly prejudicial to the defendant Edgerton before the jury in the following particulars:

(A) During the course of the examination of plaintiff's witness Florence Anderson, the following occurred:

"Q. But you can definitely state that those whose names I have given you with the addition of Brayton, were directors as of that date?

A. I can.

Mr. Irwin: Pardon me, your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him. I think we are entitled to have the entire board.

The Court: Now, I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * *. You may bring out those matters on cross-examination and I shall not tolerate any more interruptions of that sort."

(B) During the course of the examination of plaintiff's witness, Perkins, the following occurred.

"Asked who handed it to him for his signature, the witness answered: 'I presume it came from the manager's office; that is my best recollection.' (Thereupon plaintiff's Exhibit 139 for identification was received in evidence. Said Exhibit is separately certified pursuant to stipulation and order of Court.)

"Mr. Campbell: I will ask to have marked as 139-B the portion of this file. With counsel's permission, may I take the two mimeographed letters away from the clip?

Mr. Lawson: Not only with my permission, but it would be very much in accord with my conception of how these letters should be introduced, that they should be introduced separately.

The Court: Just say "yes" and save a lot time.

Mr. Lawson: Your Honor, I want to call your Honor's attention to what I think is—

The Court: (Interrupting) I don't want any discussion in front of the jury. You consent. That is all that is necessary.

Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers."

(C) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that it is not the best evidence.

* * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book,

each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours."

(D) Upon offer of Plaintiff's Exhibit 46 in evidence the following occurred:

"Mr. Lawson: Your Honor, the matter really hasn't received a great deal of attention, and I think it is a very important part. Your Honor has read the comments, and you are familiar with them. I merely submit this is a test: That if the witness were on the stand himself, he wouldn't be permitted, under objection, to testify, because he would be stating opinions and conclusions. I think that is sound, your Honor.

The Court: I disagree with you on that. I shall when the time comes instruct the jury that this is not being admitted to prove the truth of the statements contained in it, but simply to show that that information was communicated to the defendants. You mean to tell me that if that auditor told these defendants that he permitted to say that he told them in person?

Mr. Lawson: Under the circumstances of

this case I would take that position, your Honor.

The Court: Then that is a matter that will have to go to the Circuit because I disagree with you on it. I will admit it on that point. It is not being admitted to show the truth or falsity of what is contained in that auditor's report, but to show that that audit report was delivered to these directors.

Mr. Lawson: I would like to have included in the objection, which I have already made, the specific objection of hearsay. And futher, that it has not been connected up in this manner; that the mere fact that it was on file with the corporate records is no proof of the direct knowledge of the defendants Ireland and Edgerton."

(E) During the course of the examination of plaintiff's witness Grace Benn, the following occurred:

The witness testified "I think the gentleman I talked to that time was Mr. Ireland. At that time I discussed the purchase of my securities."

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: No.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so. I just saw him the one time.

Mr. Lawson: May the record show that is Mr. Ireland.

The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, your Honor.

The Court: Stand up again. Is that the man you talked to, if you know?

(The defendant Ireland arose, as requested.)

The Witness: No, I don't think so."

(F) During the course of the examination of plaintiff's witness, Audra D. Jones, the following occurred:

"Q. Do you recognize the gentleman in the court room with whom you had conversation on that occasion?

"A. I don't think I would.

Q. Well, will you look about the court room and see if you see him here?"

Thereupon the court directed each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had

the conversation and the witness in each instance replied "No" or "I don't think so."

(G) Plaintiff by reference incorporates paragraphs (A) (B) (G) (I) (J) (K) of the Assignment of Errors No. 27 as a part of this Assignment of Error constituting conduct of the Court in the presence of the jury highly prejudicial for the defendant Edgerton.

(H) Following the introduction in evidence of Defendant's Exhibit 39 reciting details concerning financial transactions of the Investment Finance Company with Pierce Petroleum Corporation and Charles E. and Maryan A. Kenner and subsequent to the admission in evidence of Plaintiff's Exhibit 46, the court made the following statement:

"The Court: Now, Gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

XXIX

Said District Court erred in overruling the objections and exceptions of the defendants and each of them, respectively, to Plaintiff's Exhibit 216 and admitting the same in evidence, in denying the motion of the defendant Edgerton at the conclusion

of the plaintiff's case and renewed at the conclusion of all of the evidence in the case to strike said exhibit. The plaintiff's witness Webster testified that on July 9, 1940 Plaintiff's Exhibit 216 came into his possession from the inspector in charge at San Francisco, California; that he had a conversation with the defendant Twombly with respect to Plaintiff's Exhibit 216 on July 9, 1940; that the defendant Twombly stated that he had prepared Plaintiff's Exhibit 216 from memory and handed the same to Inspector Van Meter and that the information contained in said exhibit came to his attention while he was associated with the First Security Deposit Corporation and the Investment Finance Company. Prior to the receipt of said Plaintiff's Exhibit 216 in evidence, the following proceedings were had in the absence of the jury:

"Mr. Campbell: * * * Now, this document is offered, you might say, upon two bases; First, as admission against interest on the part of the Defendant Twombly, and, second, to show his joining that scheme, or enterprise, and as to him the existence of a scheme or enterprise."

* * * * *

"The Court: Now, I think it is only fair, in order that you may present the matter intelligently to the Court, to say that it involves, for the purpose of illustration (I have gone through it very hurriedly) all of the defendants and describes at some length, six pages, single spaced, the activities of this corporation. So that for the purpose of argument, you may

consider that all of the defendants are involved."

"The Court: It is perfectly clear that such a document as this couldn't be considered to be properly introduced in evidence as against the other defendants, having been made subsequent to the termination of any possible connection which he had with the conspiracy, * * *"

"* * * it is conceded by the Government that Twombly severed his connection with both of these corporations about the 21st of December, 1938. Now, on July 9th, 1940, a year and a half after that, he made the statement to the postal inspector as to facts."

"Mr. Lawson: * * * when I thought or heard the rumor that there might be hostile defenses, I had Mr. Adams bring Mr. Twombly to my office. * * *

"and I canvassed this situation with him very carefully to find out—I am not saying that there are any hostile defenses—but to find out as to whether or not there were any hostile defenses.

We spent about three or three and a half hours in canvassing the case, and in all of its phases, and I was assured from the beginning until the end that no statement had ever been made by Mr. Twombly, either in the form of a written statement, or any oral statement, that he had made any damaging or incriminating statements pertinent to my client, or any of the other defendants in the case. And I want

to assure your Honor that I went into that very thoroughly, and carefully.

I have no reason to believe that that statement contains anything contrary to the statements that were made to me at that time, and I can assure your Honor that up until the time that this statement was presented I have always been of that mind."

"* * * if, assuming now that it does contain something contrary, as represented to me—it is a complete surprise. We have been collaborating all through the defense on the assumption that no statement has been made of a damaging character to my clients.

* * * * *

Mr. Irwin: Why did we make all this inquiry at the outset?

Well, it is no secret that there was a very severe disagreement between Mr. Twombly and the others, and the break was not a pleasant one. It happened in '38, and prior to the time of this indictment they weren't even on speaking terms, so as lawyers, being advised of that, we were interested in finding out what had gone before, and that is why we started looking for those statements that might be made by a person in the heat of passion or who doesn't reason."

"The Court: * * * If they want to know what it is right now, we will have to read it out loud * * *."

(Thereupon said Plaintiff's Exhibit 216 was read into the record in the absence of the jury.)

"Mr. Campbell: If your Honor please, my position in this matter is * * * the narration of these events by Mr. Twombly constitutes admissions on his part, first, as to his knowledge of those events at the time they occurred, * * *, secondly, that he had knowledge of the existence of a scheme to defraud, * * * and that he knowingly joined in that scheme * * *

Mr. Lawson: What I would like to know, your Honor, the question of knowledge wherein does that document show that Twombly had that knowledge during the existence of the conspiracy. I don't see it."

"Mr. Irwin: In the event your Honor rules that this statement may be received as to the defendant Twombly only I believe that a motion for a severance should be made on the following grounds:

The Court: You make this motion now applicable to the time it is admitted?

Mr. Irwin: * * * I respectfully move * * * for a severance from this trial on the following grounds: That the evidence contained in Plaintiff's Exhibit 216, though it is competent or might be competent as against the defendant Twombly, is incompetent, hearsay, and prejudicial to the rights of the (other) defendants * * * and that its admission deprives the defendants of a fair and impartial trial to such

an extent that no admonition to the jury would remove the prejudice created by the reception of that exhibit * * * in evidence. * * * When I was retained in the case, I was advised and told by my clients that they didn't trust Mr. Twombly, that they didn't want to cooperate with him in connection with the trial because there had been considerable friction and considerable hard feelings, and that he had been discharged from the company under very unhappy circumstances, they didn't wish to collaborate or to cooperate, and to watch him. That, in effect, was the admonition.

As we got into the investigation of this case, word was sent to Mr. Edgerton by mutual friends of Mr. Twombly, that his attorneys should certainly cooperate with him and that there was no hard feelings, what is gone is gone, and everybody was in the same boat, and that he wanted to get together. * * *

"* * * We understood that Twombly had been assisting the post office inspectors in the investigation of the case. * * * We understood that there was prejudice and hard feeling—* * * but what we wanted to know before we considered any collaboration and likewise whether or not we should consider a motion for severance which had to be supported by affidavits—was whether or not Mr. Twombly had made any written statement of any kind to the post office inspectors * * * which would implicate or in-

volve or cast discredit and which might be admissible in evidence in this lawsuit.

* * * Mr. Adams told me, not once but on several occasions, that he had interrogated Mr. Twombly * * * and that Mr. Twombly had assured him that there wasn't any, and that he, Mr. Adams, * * * was satisfied that Twombly, in fact, had made no statement. Twombly told me he had made no statement as late as yesterday afternoon * * * He said 'You won't find a thing damaging to your clients in that statement.' * * * If we had made a motion for a severance before the trial started, after the inquiry and the research we made, we would have had no grounds. We couldn't have made any affidavit * * * There was an antagonistic defense * * * there was nothing which would have justified a motion for severance before this jury was impanelled, we could have made no showing to the court."

* * * * *

"I believe it is very persuasive that this statement of itself indicates that the defenses, and that are now for the first time known to us, is clearly hostile and clearly antagonistic.

"Now, as to the prejudicial nature, may it please the Court, even though it is restricted as to the Defendant Twombly, I will ask your Honor's consideration of this fact: Would your Honor say that in our duty to our clients, that even though your Honor restricts this statement to the Defendant Twombly, that we could

go on and present the defense in this case, which would ignore, before the jury, the accusations and charges made by the defendant Twombly?

The question suggests its own answer.

For example, your Honor, we would have the burden of showing that in the fore part of that statement, Mr. Twombly leaves out that Mr. Edgerton had nothing to do with it; that Haight and Trippet were the attorneys who organized that, and that H. F. Dunton, the man who outlined the plan, had just recently resigned as Deputy Building and Loan Commissioner.

We would have the burden of showing that Mr. Twombly initiated the Pierce Petroleum loans and initiated the dog food plan.

I say to your Honor, as opposed to the question of the prejudicial nature, I think it suggests its own answer. * * * This matter before us, * * * isn't an admission; that is a complaint that this man initiated it. * * * Now it appears for the first time that that is why we are here. * * * What it amounts to, * * * is a second indictment we have to meet. It includes charges, * * * that are not contained in this indictment."

"Mr. Lawson: Your Honor, might it be considered that the same motion that was stated by Mr. Irwin, that it may be made on and in behalf of the Defendants Edgerton and Ireland and on the grounds therein stated, that prejudice will result in the trial of Edgerton

and Ireland, and of such character that no instruction or limitation by the Court as to proof will cure the prejudice; and as a result they will not have a fair and impartial trial.

The Court: It may be stipulated that the same motion may be deemed to be made as to those defendants.

Mr. Campbell: So stipulated.

* * * * *

Mr. Lawson: The vice in this situation is this: That the statement, as made by Mr. Twombly, is, in the form of an accusation, or a complaint against the defendants, and particularly as to the defendant Edgerton. Ninety per cent of that statement is a *strieture* against Edgerton in so many words; in so many words it says that he is guilty of this, that, and the other thing, stating a long series of conclusions, not a statement of fact.

Presuming for the moment that up until the time of the trial that everything was done properly; that is, a proper course of conduct was taken by counsel in regard to the protecting of the right of the client, which I am satisfied was, and I might say, incidentally, there, that I am familiar with the rule that ordinarily a motion for severance is not granted. * * * I wouldn't make that motion unless * * * I had * * * strong reasons to support my application, otherwise, we would be merely making a frivolous motion."

"Here is the situation that we find ourselves in: As I stated to Your Honor yesterday, that having heard statements of a character that Twombly may have said something derogatory about the Defendant Edgerton, I believe I discussed this with Mr. Campbell and Mr. Campbell said in a jocular vein, said, 'Well, what we have on Twombly,' and so forth. I think that is a correct statement. I think in the same vein I asked him what it was, and he said, 'You will hear about that later.' "

* * * * *

"Mr. Lawson: I went into the matter first with Mr. Adams and discussed it with him, and then I suggested that Mr. Twombly come to my office, and Mr. Adams and Mr. Twombly came to my office * * I took my gloves right off and put it in a very blunt form of question, and told him exactly what I had been informed, and that I wanted to know * * * if he had made (a) statement. * * * Now, Mr. Twombly, * * * I learned * * * during our discussion that evening, is not only a lawyer, but he is an accountant. * * * He not only kept the books, but he made the audits. * * * Now, when we discussed it that evening, * * * after I was assured that * * * no damaging statement had been made, and that he would fully cooperate, I said, 'You are just the man to take care of that period, because of your particular knowledge and skill, and on all questions relating to that period we are going to look to you to take care of.' That was the

understanding we had, and I relied upon it all through the preparation of the case and during the trial of the case.

* * * * *

The Court: Now, let me ask you just one question: Suppose that Mr. Twombly had said to you yesterday 'Gentlemen, whether you like it or not, I have made up my mind that I am going on the stand, and I am going to answer every question that anybody asks me about this matter;' would you be in any different position?

* * * * *

Mr. Irwin: * * * The defendant can take the stand and have the opportunity of cross-examination. It comes for the first time, and he puts in his direct testimony, and it must be evidence and not conclusions. You have an opportunity to object to every question as he goes along, and he is confined to legal competent evidence. Now, this statement contained all kinds of conclusions.

* * * If he took the stand he would not be able to state that Starr, Smale and Thomas violated their trust, the trust of those depositors, because that is hearsay, clearly as to him. There is nothing in the books. Plaintiff's counsel hasn't shown a thing that Starr, Smale and Thomas violated their duties, that they had been running around indiscriminately getting the security holders signed up.

All that stuff that he refers to in '31, '32, and '33, the most damaging kind of things, Your Honor, which are the rankest hearsay on his part, because he doesn't come in until '34.

I think those are two points upon which Your Honor's hypothesis may be distinguished.

Again, in that connection, his manner on the stand, the usual instruction that the jury has, our cross examination proving the falsity of his statements, providing we can, would be checked and counter checked by a restriction, so that we got only competent evidence; and that the full story would be there at one time instead of going in this way that the burden is upon the defendants of taking something, which is not admitted as against them, and cannot be received as against them, and refuting the whole thing in addition to what is in the indictment."

"The Court: * * * I have made up my mind that my ruling will be that there will be no severance * * * I shall be willing to receive and permit them to file * * * any affidavits that they may want * * *.

Mr. Irwin: * * * Might I ask your Honor whether this wouldn't eliminate unduly encumbering the record * * * if Mr. Lawson and I were permitted to be sworn * * * and then state that the statement given * * * is true in all respects, to the best of our knowledge, * * *. Therefore that that would be in effect our tes-

timony without encumbering this record with affidavits?

The Court: I am perfectly willing to have you, in lieu of affidavits."

Thereupon, J. J. Irwin and Gordon Lawson having been first duly sworn were examined and testified as follows:

"The Court: Was the statement that you made this morning true as to the facts which you gave in connection with the motion for severance, Mr. Irwin?

Mr. Irwin: It was, your Honor; in substance, each and every one of the facts related are my recollection.

The Court: So far as you know at the present time, there are no corrections or errors in that statement of facts?

Mr. Irwin: That is correct.

The Court: In so far as the statements purported to indicate any knowledge on your part or any contact on your part, was it true?

Mr. Lawson: True, your Honor.

The Court: You have no correction to make?

Mr. Lawson: No corrections."

"Mr. Irwin: So it may be preserved, may it be stipulated that the motion has been made and that it is denied and exception is granted?

The Court: Yes.

Mr. Irwin: There is this other motion to-wit, the motion is now made, may it please the Court, on behalf of the defendants Starr,

Smale and Thomas, individually, for themselves, that this Honorable Court withdraw a juror and thereupon declare a mistrial because of the introduction and the receipt of Exhibit 216? That is to complete the transaction.

The Court: The same motion as to your client?

Mr. Lawson: Yes, on behalf of the defendants Edgerton and Ireland.

The Court: The motion will be denied, exception.

Mr. Irwin: May it be considered, your Honor, that these motions were made in a proper sequence following the receipt of 216, and I think this point should be raised, your Honor.

The Court: Just a minute. May it be so stipulated that the motions may be deemed to be made in their proper sequence?

Mr. Campbell: So stipulated.

Mr. Irwin: Your Honor, in this connection, with reference to 216, there has never been any formal objection stated on behalf of the defendants; in other words, your Honor was good enough to consider a motion for severance on the assumption that it was in evidence, so whenever your Honor thinks it is appropriate, and while the jury isn't present, I think the objection should be made.

The Court: Make it right now because I am going to bring the jury down.

* * * * *

Mr. Irwin: Your Honor, objection is made to the reception of Exhibit 216 for identification, specifically and individually, on behalf of the defendants Starr, Thomas and Smale on the grounds that although the offer is limited to the defendant Twombly and the evidentiary matter contained in that Exhibit is incompetent as against the defendants Starr, Smale and Thomas, and cannot be received against them, that nevertheless its being received only towards Twombly, that the nature of the Exhibit is so prejudicial to the rights of the several defendants that I have mentioned and it deprives them of a fair and impartial trial to such an extent that no admonition to the jury can or would remove the prejudice created by the reception of that document.

I think I have covered the grounds. Thank you, your Honor.

Mr. Lawson: I want to join in that objection, your Honor, and add to it, on behalf of the defendants Ireland and Edgerton, that there is no evidence in the case that connects up either of the defendants Edgerton or Ireland with the scheme or conspiracy, as alleged in the indictment, and that this is an attempt by indirection to make a connection between those defendants with the scheme and conspiracy as alleged.

* * * * *

Mr. Irwin: Your Honor, I think I should add that the statement in addition is prejudicial because it contains matters which are not

contained in the issues of the indictment, and that it includes matters which are clearly only hearsay as to the defendant Twombly and could not be binding on the defendant I represent.

Mr. Lawson: I wish to adopt that and add to it that it touches on matters that have already been limited to a point, that this statement goes beyond that limitation. As a matter of fact, that it admits evidence that the Court has already ruled to be objectionable.

The Court: The objection will be overruled.

The rule of the Court is that that limitation does not apply to the offer, as limited, or are the objections sound under the offer as limited, to not only the defendant Twombly but as to the intent of the defendant Twombly." (To which ruling of the court, an exception was duly taken.)

(Thereupon said statement was received in evidence and marked plaintiff's Exhibit 216.)

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. * * *

Now I might think that John Doe and Richard Roe and Bill Smith and Mary Grab were the dirtiest bunch of crooks in the world, and I might take an action predicated upon that feeling. It might not be true at all. And what I thought about these people might be no evidence

at all as to what they actually were, or as to what I thought had occurred.

We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, as against any defendant in this court room, including the Defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that.

To illustrate: Whether or not those things were true or false would be immaterial so long as the Defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances."

Thereupon said Exhibit 216 was read to the jury. Said Exhibit is in words and figures following:

"(In ink) Prepared by Mr. Twombly.

"The first Security Deposit Corporation was organized in 1931 for the purpose of reorganizing the Railway Mutual Building and Loan Association. The latter company was rendered non-operative because of the building and loan situation existing at that time, together with the check on operations because of the more stringent building and loan laws as compared with the regulation of general corporations.

To effect the transfer of securities and assets of the Railway Mutual Building and Loan Association it was necessary to procure the

consents of its securities holders. For this purpose an extremely complicated Plan and Agreement was adopted whereby the said holders were to deposit their securities and receive in exchange therefor interim certificates. R. W. Starr, E. C. Thomas and L. S. Edwards were appointed as trustees and managers under the said plan. High pressure salesmen were then sent out to contact the securities holders for the purpose of procuring their consents to the proposed plan of reorganization. These holders were apparently promised and told anything and everything in order to obtain their consents. Those who consented easily got either what they were supposed to be entitled to in securities of the new company, or less. Those who were not so easily sold on the idea in many instances were given preferential securities. No plan of exchange of securities was consistently followed. The so-called Plan and Agreement was so long and so complicated that it was apparently understood by nobody, however, there is no doubt but that the trustees were extremely derelict in their duties.

After the expenditure of approximately \$60,000 of those investors' money, it was then determined that there was no law which would permit of the reorganization. Lobbyists were then put to work to procure the passing of enabling legislation by the Legislature of the State of California. This was ultimately accomplished. Until approximately this time the af-

fairs had been dominated and controlled by R. W. Starr, E. C. Thomas and J. L. Smale, and at this time J. H. Edgerton, an attorney, was added. It was still impossible to complete the reorganization because an insufficient number of consents had been obtained. To put the deal over a deal was made with Charles E. Kenner (a graduate of Sing Sing prison for the misuse of other people's money and now in Folsom penitentiary for the same reason). Kenner was to obtain sufficient additional securities or consents to make the plan operative and was to receive approximately \$40,000.00 in good first trust deeds for which he had the option of trading Railway Mutual Building and Loan Securities or securities in the First Security Deposit Corporation face value for face value. At this time these securities were quoted at about 20 cents on the dollar. The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and those they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted.

The reorganization was finally completed with approximately 20% of the investors staying in the Railway Mutual Building and Loan Association and about 80% high pressured into

the First Security Deposit Corporation. The basis of the financial structure of the First Security Deposit Corporation was three classes of stock, and a great many varieties of collateral trust bonds. The First Security was to take 80% of Railway Mutual Building and Loan Association assets and liabilities and the balance was to remain. The same amount of securities in the Railway Mutual Building and Loan Association were to be turned back to them for cancellation. The Building and Loan Commissioner of the State of California designated the segregation of assets, and the best 20% remained in the Railway.

The First Security Deposit Corporation issued bonds in the sum of approximately \$1,300,000, preferred stock (A and B) in the amount of \$274,460, and common stock in the amount of \$4,488. Of the latter stock Starr, Thomas and Smale controlled about \$3,350, and this was the voting stock. In this way control was carried on and \$3,350 controlled this \$1,600,000 corporation for a period of two years. At this time, inasmuch as no dividends had been paid on the preferred stock, the preferred stock became the sole voting stock. However, this made no difference as at the time of issuance of the securities every investor was requested to execute a signature card. Some refused but the huge majority complied. On the reverse side of this signature card there was printed the following, "Proxy, I hereby appoint R. W.

Starr, J. H. Smale, and E. C. Thomas, or any two of them acting in accord, as my proxy to vote my shares at all meetings at which I am not present or have a subsequent proxy, for a period of seven years unless revoked earlier. No statement or condition, verbal or written, other than herein provided shall be binding on the corporation."

No notice of any stockholder's meeting was ever given other than by publication in *The Daily Journal*, a Los Angeles legal newspaper, and which is not read by the public at large. Therefore, for all practical purposes, the control of the corporation remained unchanged.

The assets in the segregation were finally transferred effective as of January 1, 1934. The Board of Directors of the First Security Deposit Corporation consisted of R. W. Starr, E. C. Thomas, W. S. Brayton, A. R. Ireland, C. E. Perkins and Wm. Leffert and C. H. Berry. Berry and Perkins have subsequently resigned and Brayton has died. J. H. Edgerton was attorney. J. L. Smale remained in the Railway Mutual Building and Loan Association as president.

About this time a first trust deed held on the Reed Bros. Mortuary for approximately \$42,000 was in considerable trouble. Mr. Edgerton formed the R. F. D. Discount Co. (at first a partnership and later a corporation) which was conducted and operated in his office. The interested parties were Edgerton, Starr, Smale,

Thomas, Berry, Leffert, Brayton, Ireland, also Aaron Johnson and Florence Anderson who were with the Railway Mutual Building and Loan Association. The R. F. D. Discount Company purported to act as go between in the settlement of this trust deed. Reed Brothers paid \$22,000 in cash into an escrow at the Title Insurance and Trust Company, \$17,800 of this sum was paid to the First Security Deposit Corporation in settlement of all liability under the trust deed. Edgerton retained \$1,000 as attorney's fee. R. F. D. Discount Company got \$3,200 for which each of the ten persons received a \$320 interest in the R. F. D. Discount Company. The only item showing on the records of the First Security Deposit Corporation is the receipt of the \$17,800. No attorney's fee to Edgerton is shown and not approval therefor was ever given by the First Security Deposit Corporation officially.

Early in 1934, a deal was made with Battell-Dwyer Company (a stock and bond concern). They were to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid 5 points above what they paid upon delivery of the securities to the First Security Deposit Corporation. On many occasions it appeared they took more than five points, but nothing was done about it. Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The

original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was procured free on the representation that it was without value.

Included in the assets of the First Security Deposit Corporation was a house on Stearne Drive, Los Angeles, California, and was carried on its books at approximately \$7,500. Edgerton, in 1934, decided to buy the house. The First Security Deposit Corporation had acquired some of its own bonds, so Edgerton bought \$7,155.06 face value. These had been bought for \$2,206.64. Edgerton had these bonds deposited in an escrow where payment was to be made. In the same escrow, he had the papers transferring ownership of the real property deposited. In the escrow he borrowed approximately \$2,300 on the real property from the State Mutual Building and Loan Association. With this money he paid for the bonds and the costs of the escrow. The bonds were then returned out of the escrow to the First Security Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in full payment for the bonds, or a cash loss on the bond deal alone of \$185.35. Approximately one year later, the

First Security Deposit Corporation took back another piece of property located at 239 21st Place, Santa Monica, California. Edgerton bought this property. He sold the Stearne Drive House for about \$4,500.00 cash. From Battelly-Dwyer and other sources, he purchased bonds of the First Security Deposit Corporation of a face value of \$11,750. The price paid was between 30 and 40 cents on the dollar. These bonds, together with the cash sum of \$110.44 was given by Edgerton to the First Security Deposit Corporation for the property. This resulted in a book loss on the property of \$372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about \$7,000.00.

In the summer of 1934, auditors in checking bond purchases by the First Security Deposit Corporation from Battelly-Dwyer Company discovered that on approximately 1,000 shares of First Security Deposit Corporation preferred stock \$1.00 per share was added to the price charged for bonds and paid by the First Security Deposit Corporation, and the stock was delivered to Edgerton and Starr for the R. F. D. Discount Company. Battelly-Dwyer Company refunded this money to the First Security Deposit Corporation and rearranged their deal with the R. F. D. Discount Company. R. F. D. Discount Company had now become the medium for acquiring all the stock it could of First Security Deposit Corporation. Practically its en-

tire working capital consisted of the \$3,200 hereinbefore described. This stock carried voting control, and all of it would become very valuable if the bond holders could be chased out of the picture cheaply enough.

About this time Kenner decided he could use the Railway Mutual Building and Loan Association in some of his manipulations. He approached Edgerton for the purpose of purchasing about \$19,000 face value of securities which the First Security Deposit Corporation owned in the Railway Mutual Building and Loan Association and had much to do with its control. It was arranged that the R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to the First Security for its securities in the Railway. This was done, although all holders of First Security Deposit Corporation stock were being assured by Battelle-Dwyer Company that it was worthless. Kenner then paid \$1,000 to R. F. D. Discount Company for an option to purchase the Railway securities. He didn't take up the option and forfeited his money. However, the Railway (with some assistance through the use of First Security money in purchase of securities to get the necessary consents) subsequently became federalized and these securities were redeemable for 100 cents on the dollar. Sometime later P. S. Noon needed money in mining operations. He approached Edgerton and it looked like a very lucrative

deal to him. He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money for him. It appears that they borrowed about \$15,000 worth of the Railway Mutual Building and Loan Association securities from the R. F. D. Discount Company and hypothecated their stock in the R. F. D. Discount Company to the R. F. D. Discount Company for the return thereof. Edgerton then hypothecated the Railway Building and Loan Association securities to F. E. Jones borrowing money from him which was loaned to Noon. The mining deal failed to come up to Noon's expectations and he is now endeavoring to pay off. Another ramification will be described later. Noon is apparently 100% honest, being a court reporter of excellent reputation.

In October, 1934, Edgerton had caused the formation of the State Investors Corporation, consisting of his father and one J. L. McSwiggen (a former employee of the First Security Deposit Corporation), State Investors Corporation was entirely devoid of any financial backing, yet in October, 1934, the Board of Directors of the First Security Deposit Corporation agreed to enter into a contract whereby it would sell \$187,020.93 book value of designated real property to the State Investors Corporation. The State Investors Corporation took immediate possession of the properties and was entitled to receive all rents. It had no obligation to make any payments, other than for taxes,

for one year. It could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property, or could pay in cash at the rate of 40 cents in cash for each \$1.00 of book value. This arrangement was so entirely bad and unsatisfactory to the First Security Deposit Corporation that the contract was cancelled by mutual consent after about six months.

Dar Knowled, son-in-law of J. L. Smale, purchased a property from the First Security Deposit Corporation for about \$1,000 cash. He immediately borrowed an amount from the State Mutual Building and Loan Association sufficient to return the \$1,000 and buy furnishings for the house. It is believed that the property was subsequently sold at a handsome profit. Some such deal was also made with another relative (father or father-in-law) of J. L. Smale.

Through the efforts of Battelle-Dwyer Company and others approximately \$700,000 worth (face value) of bonds of the First Security Deposit Corporation were acquired and retired, up to the time Battelle-Dwyer Company became more or less inactive in the field. It was an extremely lucrative deal to them, a great deal of the bonds having been acquired through the trading of other securities therefor.

In 1935, the Investment Finance Company was organized and operated in conjunction and

out of the same office with the First Security Deposit Corporation. Its original capitalization was exceedingly small, the First Security Deposit Corporation being the main holder of stock with the purchase of \$1,000. This it still holds. Subsequently all of the R. F. D. Discount Company holdings were sold to the Investment Finance Company and the proceeds distributed and the corporation was dissolved. This included the Railway Mutual Building and Loan Association securities which had been pledged. In order to cover this item these same individuals hypothecated their holdings in the Investment Finance Company (which they had acquired by purchasing stock in the Investment Finance Company, with the money received from the sale of R. F. D. Discount Company assets to the Investment Finance Company.) Stock was put up as follows: Starr 2500 dollars, Mary Starr Brayton (widow of W. S. Brayton) 5000 dollars, Ireland 5000 dollars, Edgerton 1666 dollars, Anderson 1200 dollars, Thomas 1160 dollars. Some of the R. F. D. Discount Company holders did not put their entire receipts into the Investment Finance Company.

The Investment Finance Company has financed its operations by borrowing from the First Security Deposit Corporation. At the present time Investment Finance Company owes First Security Deposit Corporation about \$275,000 which it has borrowed on an open account not even giving notes therefor.

The Investment Finance Company has engaged in many activities most of which have resulted in frozen assets. A loss of about \$25,000 was had on an oil well deal with Kenner. This deal was consummated by Edgerton. Considerable losses were obtained in the automobile business, one deal being the backing of Kenner. Deals with Kenner have cost about \$75,000.

The Investment Finance Company took over the purchase of First Security Deposit Corporation securities. It borrowed money from First Security Deposit Corporation and purchases its securities from its investors. The bonds it purchased below face value are either still held or have been turned over to the First Security Deposit Corporation at full value (including accrued interest). The stock it purchased was kept and held for purposes of control of the First Security Deposit Corporation. Letters were written to First Security Deposit Corporation investors telling them First Security Deposit Corporation was in liquidation, and so forth. One C. L. Cronk was employed for this purpose. This was over the opposition of at least one director who stated he believed the writing of such letters was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. No attention was paid to this except that a committee was appointed to handle the matter and consisted of Starr, Thomas and Cronk. Later Edgerton superseded Thomas. Edgerton finally decided that no let-

ters should be written out of the State of California. The Investment Finance Company through this procedure, and through the R. F. D. Discount Company purchase, has acquired about \$100,000 par value of First Security Deposit Corporation preferred stock and about three-fourths of the common stock.

Edgerton became interested in the Western Brick Company and caused the Investment Finance Company to invest about \$30,000 therein, besides loans by the American National Bank of Santa Monica. He, Starr and Thomas, acquired some free stock for themselves in the transaction. This company was revamped and the assets were sold to the Pacific Brick Company, thereby freezing out minority stockholders in the Western Brick Company. The company has operated at a loss since acquisition.

Edgerton, with Battelle-Dwyer Company, then presented a deal involving the American National Bank of Santa Monica to the Investment Finance Company. The bank had a capitalization of \$100,000 and a purported surplus of about \$22,000. Assets listed consisted partially of a building valued at \$84,000 and furniture and fixtures valued at \$17,000; both actually worth not more than \$50,000, giving a real approximate value of \$71.00 per share. The Investment Finance Company purchased 100 shares at \$150.00 per share and loaned Battelle-Dwyer Company \$150.00 per share on 167 additional shares. The balance necessary to

constitute control of the bank was sold to clients of Battelle-Dwyer Company after a voting trust had been formed wherein Edgerton and Dwyer were voting trustees. Battelle-Dwyer Company was unable to pay the loan, going out of business, and the Investment Finance took over the stock. The Investment Finance Company now has about \$54,000 invested in stock of the bank, and it does not seem possible that any dividends can be paid for several years. One director of the Investment Finance Company went on the bank board and stayed about two months. He claimed something was wrong somewhere in the set-up, including the management of the bank, and should be thoroughly gone over. Edgerton and Starr decided Starr should go on in the fault finder's place to represent the Investment Finance Company on the bank board. Six months later, after much unnecessary money had been spent by the bank, the management of the bank was changed. About two years later the bank examiners found that the building had been written up from \$1.00 to the value shown on the balance sheet and cash dividends paid on the surplus accruing from the write-up. This happened shortly prior to the advent of the Investment Finance Company into the picture. It is now necessary that additional funds be put into the bank to rearrange the capital structure to clear up the capital impairment that exists. Edgerton and Starr are now directors on the bank board.

In connection with the bank, another corporation was formed, the American Building and Investment Company. This operates in conjunction with the bank being used as a spring board. Investment Finance Company has invested about \$20,000 in this venture which has not as yet shown any huge profits.

One W. P. Bonds next came along and sold Arnold Eddy (associated with Edgerton in the California Federal Savings and Loan Association) and Edgerton on the dog food business. The Investment Finance Company decided to go for the deal. When building was discussed only one individual wanted to build on a strict contract basis. Instead it was a cost plus job and cost many times the original contemplated price. Approximately \$60,000 has been invested in this venture.

None of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between \$300,000-\$400,000.

Edgerton is attorney for all of these companies and actually runs them. He is manager of the First Security Deposit Corporation, Investment Finance Company and the California Federal Savings and Loan Association. Attorneys fees paid by the Investment Finance Com-

pany and the First Security Deposit Corporation (prior to the time Edgerton became manager) for the period January 1, 1934, to April 1, 1938, were about \$15,000. \$5,000 would be excessive.

In order to qualify Miller, Hollowell, Starr and Edgerton as directors of the American National Bank, it was necessary that they have stock in the par value \$1,000 and execute affidavits that this stock belonged to them free and clear and was unencumbered in any way. The Investment Finance Company delivered to each of them the necessary stock and took from them promissory notes in the sum of \$1,500 (the amount paid for it by the Investment Finance Company). There was no intent on the part of any of them to pay for the stock. Edgerton's and Starr's stock is held in the office of the Investment Finance Company assigned in blank by virtue of a separated assignment attached to the stock for easy removal in case of inspection. The same is true of Miller and Hollowell except that it is held in a safe deposit box in the bank. There is a gentlemen's agreement that no effort will be made to collect the notes. This is merely a subterfuge to get around the requirements of the government.' ''

The grounds of said error in overruling said objections of the defendant Edgerton to Plaintiff's Exhibit 216 and in denying his motion to strike said exhibit were and are the grounds of his objections hereinabove stated.

XXX.

Said District Court erred in denying the motion of the Defendant Edgerton for a severance made at the time of the offer of Plaintiff's Exhibit 216 in evidence and upon the conclusion of all of the evidence in the case.

The grounds of said motion were and the grounds of said error in denying said motion were and are the grounds substantially as hereinabove set forth in Assignment No. 29, which said grounds are incorporated in this assignment by reference. To which ruling of the court denying said motion for severance the Defendant Edgerton duly excepted.

XXXI.

Said District Court erred in denying the motion of the Defendant Edgerton that the court withdraw a juror and thereupon declare a mistrial because of the introduction and receipt in evidence of Plaintiff's Exhibit 216.

The grounds of said motion and the grounds of said error in denying said motion were and are the grounds substantially as hereinabove set forth in Assignment No. 29, which said grounds are incorporated in this assignment by reference. To which ruling of the court denying said motion for a mistrial the Defendant Edgerton duly excepted:

XXXII.

Said District Court erred in permitting the plaintiff's witness Bruce to testify over the objections and exceptions of defendants as follows:

The witness further testified: That as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation due to First Security on notes payable in the amount of \$240,465.80. That obligation was retired as of that date; assets were transferred to First Security.

"Q. Will you state what those assets were as reflected by the books?

Mr. Irwin: Might it be understood that this testimony as to the attorneys is particularly objected to as immaterial, and not within any of the issues of the case.

The Court: The objection may be considered to be made as to all defendants to whom the testimony is applicable; overruled; exception allowed subject to a motion to strike unless properly connected up.

Mr. Irwin: I should like to add the objection of hearsay.

The Court: It may also be considered to have been objected to on the ground of hearsay, and overruled; an exception allowed.

The Witness: Notes receivable, \$44,010.02; obligations of the Pacific Brick Company, \$38,-415.33; obligations of the Bond-17 Dog Food Company \$111,018.81; obligations of the American Building and Investment Company, \$19,-339.74; stock of the American National Bank of Santa Monica, \$23,646.00; stock of the First Security Deposit Corporation, \$29,984.80; sec-

ond trust deeds, \$28.67; furniture and fixtures, \$12.67. Prepaid expense, \$17.47; Suspense, which is the reserve for contingencies, \$250.25; total, \$266,723.76.

By Mr. Campbell:

"Q. Now, with reference to the notes receivable, will you state of what items that consisted?

A. Battelle - Dwyer Brokerage Company, \$1.00; C. E. Kenner, \$1.00; Roy A. Muller, \$6,543; P. S. Noon, \$10,200; R. W. Starr, \$11,050.50; J. Howard Edgerton, \$20,084.25; Emery Hallowell \$5,371; E. C. Thomas \$236.21; A. R. Ireland \$500; James White \$23.06."

The grounds of said error in overruling said objections were and are the grounds of said objections set forth in this assignment of error.

XXXIII.

Said District Court erred in permitting the witness Bruce to testify over the objections and exceptions of the defendants as follows:

At the time of the transfer of the assets of the Investment Finance Company to the First Security in retirement of its obligations to the First Security, the Investment Finance Company transferred the notes payable to First Security, \$250,465.80; reserves for depreciation on furniture and fixtures \$3.15; notes payable to the American National Bank in Santa Monica \$1,000; reserve for contingency \$250.00; making a total of \$251,718.95.

"Q. Now, as of that 31st day of August, 1940, what do the books and records of the Investment Finance Company reflect as to profit or loss from operations of that company?

Mr. Irwin: Your Honor, I don't mean to interrupt. My objection a few minutes ago goes to all this line of testimony, would it not?

The Court: Same objection and same ruling.

The Witness: The books reflect that the Investment Finance Company had a deficit of \$16,393.19."

Said objection previously made was that same was immaterial and not pertinent to any issues tendered by the indictment.

The grounds of said error were and are the grounds of the objection set forth in this assignment of error.

XXXIV.

Said District Court erred in permitting evidence regarding transactions between the Pierce Petroleum Corporation and the Investment Finance Company over the objections and exceptions of the defendants and each of them. Plaintiff's Exhibit 180 is a letter dated January 3, 1936 bearing the receipt stamp of the State Corporation Department of California and signed "Investment Finance Company, by J. H. Edgerton, Vice-President and C. W. Twombly, Secretary" and containing consent to the contents of the letter on behalf of the Pierce Petroleum Corporation by J. H. Edgerton, President, and C. W. Twombly, Secretary, said

letter reciting that an agreement was entered into between the Pierce Petroleum Corporation and the Investment Finance Company on November 16, 1935 wherein the Pierce Petroleum Corporation agreed not to issue any stock without the consent of the Investment Finance and that certain escrow instructions were entered into; that the Investment Finance Company has been advised that the Pierce Petroleum has filed an application for the issuance of 1995 shares of stock to Boedecker, J. H. Edgerton and C. W. Twombly and that the Pierce Petroleum Corporation may consider the letter a written authorization for allowing said stock to be issued, copy of which is recited as being forwarded to the State Corporation Department.

Plaintiff's Exhibit 181 are the minutes of the annual stockholders' meeting of Pierce Petroleum Corporation held on February 19, 1937 showing stockholders present, namely, Boedecker, 100 shares, J. H. Edgerton, 200 shares, C. W. Twombly, 100 shares, Investment Finance Company by proxy, 5 shares.

"Mr. Campbell: Now reading from plaintiff's Exhibit 42, the journal of the Investment Finance Company, reading from page 204 of such journal:

A debit item of \$24,369.80, loss on Pierce Petroleum well No. 1.

"To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our

claim against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250 cash.'

"Mr. Campbell: The item is dated December 31, 1939, and is set forth on page 204 of plaintiff's Exhibit 42. The following debit items:

'Suspense, \$2,250. Reserve for depreciation oil well equipment, \$1,844.44, unearned discount accounts purchased, \$2,-653.18, unearned income on service rendered, \$435.18, deposit Signal Hill Water Department, \$150.00. Loss on Pierce Petroleum Well No. 1, \$24,369.80.'

The following credit items:

'Accounts receivable, Pierce, \$2,696.27, oil well equipment, \$10,000; notes receivable, Pierce, \$19,006.33. To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claims against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250.00 cash. Deposit consists of \$150.00 deposited with the Signal Hill Water Department by the Pierce Petroleum Corporation, which is to be withdrawn and refunded to this company on February 15, 1939 as per agreement in file.'"

The motion was made to strike the portions of the minutes read from Plaintiff's Exhibit 42, which

said motion was granted by the court and the jury accordingly instructed; whereupon, over the objections and exceptions of the defendants, there was offered and received in evidence portions of the books and records of the Investment Finance Company (Plaintiff's Exhibit 39) showing loans by the Investment Finance Company to Pierce Petroleum as follows:

"Mr. Campbell: Reading now from plaintiff's Exhibit 39, the cash journal of the Investment Finance Company, from page 7 thereof.

'December 17, 1935.

Notes receivable — Pierce Petroleum, debit \$2100; income from service rendered, credit, \$435.18; unearned discount on accounts purchased, credit \$2,564.82; to set up \$21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per cent from date) to cover indebtedness to Investment Finance Company for \$15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation — \$1,000 chattel mortgage L No. 24 from Charles E. and Maryan A. Kenner—\$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—\$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in

ledger) — services rendered by C. W. Twombly and J. H. Edgerton for Investment Finance Company, amount of \$435.18 balance credited to Unearned Discounts on Accounts Purchased.'

The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant for the reason the same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment.

XXXV.

Said District Court erred in receiving in evidence over the objections and exceptions of defendants evidence pertaining to the application of the Pacific Brick Company to sell and issue stock, and the issuance of certain shares of its common stock to certain defendants and the Investment Finance Company, and the transfer by the Investment Finance Company of certain obligations of the Pacific Brick Company to the First Security Deposit Corporation in part payment of its debt to said First Security.

Plaintiff's Exhibit 10 is an application dated May 27, 1937 addressed to the Department of Investment, Division of Corporations of the State of California, applying for a permit authorizing it to sell and issue its stock, reciting its previous incorporation, the names of its five directors, among which were the defendants J. Howard Edgerton and E. C. Thomas, describes the property it proposes to acquire, the nature of its business is to be that of extracting clay from said property and the manufacture of bricks and other clay products, and that it seeks a permit to issue 50,000 shares of common

stock of the par value of \$1.00 per share and 50,000 shares of preferred stock of the par value of \$1.00 per share.

Plaintiff's Exhibit 11 is an application for an amendment to permit to issue and sell securities, likewise addressed to the Division of Corporations of California, dated October 19, 1938, reciting that on October 11, 1938 a permit was issued to the Pacific Brick Company authorizing the company to issue to the persons named in its application an aggregate of not to exceed 10,000 of its common shares and further reciting that the Investment Finance Company was not named in the original application as a person or corporation to which applicant proposed to sell its shares, and requesting that the permit be amended to include the Investment Finance Company. The plaintiff was further permitted to show that the books and records of the Pacific Brick Company reflected that on the 20th day of August, 1937, 500 shares of its common stock was issued to defendant E. C. Thomas and 1410 shares to the defendant R. W. Starr. That the books and records of the Investment Finance Company disclosed that as of the 28th day of July, 1938 it had acquired 16,106 shares of the Pacific Brick Company for a consideration of \$13,313.49, that as of August 5, 1938, it had acquired 5000 shares for a consideration of \$5,000.00.

The witness Bruce was permitted to testify that the Investment Finance Company transferred obligations of the Pacific Brick Company in the sum of \$38,415.33 to the First Security Deposit Corpora-

tion as part of the assets transferred in retirement of its obligation of \$240,465.80 to said First Security.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

“The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff’s case in connection with that allegation of the indictment.”

XXXVI.

Said District Court erred in permitting evidence to be received concerning the loan of moneys by the Investment Finance Company to the Bond 17 Dog Food Company and the purchase of the common stock of said Dog Food Company by said Investment Finance Company, over the objections and exceptions of the defendants and each of them. And in permitting the Plaintiff's witness Bruce to testify over the objections and exceptions of the defendants and each of them that the Investment Finance Company transferred to the First Security Deposit Corporation as part of the retirement of its obligation to the First Security obligations of the Bond 17 Dog Food Company.

The witness Bruce testified that as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation to the First Security Deposit Corporation of a note payable in the amount of \$240,465.80; that said obligation was retired as of that date by the transfer of assets of the Investment Finance to the First Security. Said witness was permitted to testify that included in these assets transferred to the First Security were obligations of the Bond 17 Dog Food Company in the amount of \$111,018.81 to the Investment Finance. The court permitted the evidence showing that between the period of February 1, 1938 and January 24, 1939 the Investment Finance Company had acquired 89,042 shares of the Bond 17 Dog Food Company at the price of \$45,-826.17; and that between the dates of May 10, 1938

and April 24, 1939 had loaned to the Bond 17 Dog Food Company at various dates sundry sums of money aggregating \$63,800.00 upon which sundry repayments in the amount of \$22,000.00 had been made leaving a balance of \$41,800.00 which was transferred to a Notes Receivable account of the Investment Finance on May 1, 1939; that thereafter the Investment Finance loaned further sums during the period of May 2, 1939 and August 8, 1940, during which period no repayments were made, leaving as of August 31, 1940 an aggregate balance of Notes Receivable from said Dog Food Company of \$65,150.00.

The grounds of said error in overruling said obligations of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

“The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admit-

ting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXVII

The District Court erred in receiving in evidence over the objections and exceptions of the defendants evidence pertaining to the application of the American Building and Investment Company to the said Corporation Commissioner of California for a permit to issue shares reflecting that the principal purpose of said corporation was investment in real estate loans, business investments and financing of a general insurance agency; that on August 12, 1938 the Investment Finance Company subscribed for and bought 17,000 shares of the 25,000 shares originally issued by said American Building and Investment Company, paying therefor the consideration of \$17,000. Said Investment Finance Company transferred to the First Security Deposit Corporation in connection with the retirement of its obligation to said First Security on August 31, 1940 obligations of the American Building and Investment Company to it in the sum of \$19,339.74.

The grounds of said error in overruling said ob-

jections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

"The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXVIII

Said District Court erred in admitting in evidence over the objections and exceptions of the defendants the testimony of the Plaintiff's witness Bruce that as of August 31, 1940 the books of the

Investment Finance Company reflected that the obligation of the Investment Finance Company to the First Security in notes payable in the amount of \$240,465.80 as of August 31, 1940 was retired in part by the transfer to said First Security of 23,646 shares of the common stock of the American National Bank of Santa Monica.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value insofar as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

In connection with the receipt of said evidence, the court made the following statement to the jury:

"The Court: Well, the reason which I have announced, Gentlemen of the Jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in fact, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Cor-

poration Department, and that I am permitting this evidence to go as being material to the Plaintiff's case in connection with that allegation of the indictment."

XXXIX

Said District Court erred in each instance in denying the written motions of the defendant Edgerton, to strike and/or exclude from the consideration of the jury certain exhibits and testimony made at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case. The grounds of said errors in denying said motions to strike were and are the grounds set forth in said written motion which said written motion is set forth in full in the Bill of Exceptions and by reference is incorporated herein as though fully set forth.

CONCLUSION

Wherefore, the said J. Howard Edgerton, prays that by reason of the errors aforesaid, that the said judgments and sentences imposed against him be reversed and held for naught.

J. HOWARD EDGERTON,
By GORDON LAWSON and
OTTO CHRISTENSEN,
Attorneys for said J. Howard
Edgerton.
By OTTO CHRISTENSEN.

Received copy of the within Assignment of Errors this 22nd day of July, 1942.

JAMES L. CRAWFORD,
Asst. U. S. Attorney.
Attorney for Plaintiff.

[Endorsed]: Filed July 22, 1942.

[Endorsed]: No. 10136. United States Circuit Court of Appeals for the Ninth Circuit. J. Howard Edgerton and Clifford W. Twombly, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 21, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
Ninth Circuit

Criminal Case No. 10136

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL AND DESIGNATION
OF RECORD TO BE PRINTED.

The appellant hereby adopts as the points to be relied upon by him on appeal the assignment of errors appearing in the transcript of the record.

The appellant hereby requests that the entire transcript, excepting exhibits separately and directly certified, be printed.

Dated: January 11, 1943.

OTTO CHRISTENSEN and
GORDON LAWSON,

Attorneys for Appellant.

By OTTO CHRISTENSEN.

Received copy of the within *State*, etc., this 12th day of Jan., 1943.

LEO V. SILVERSTEIN,
U. S. Attorney.

HOWARD V. CALVERLEY,
Asst. U. S. Attorney.
Attorney for Appellee.

[Endorsed]: Filed Jan. 13, 1943. Paul P. O'Brien, Clerk.

No. 10136

United States
Circuit Court of Appeals
for the Ninth Circuit.

J. HOWARD EDGERTON and CLIFFORD W.
TWOMBLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record
In Four Volumes
VOLUME IV
Pages 1193 to 1210

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 28 1943

PAUL P. O'BRIEN,



No. 10136

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. HOWARD EDGERTON and CLIFFORD W.
TWOMBLY,

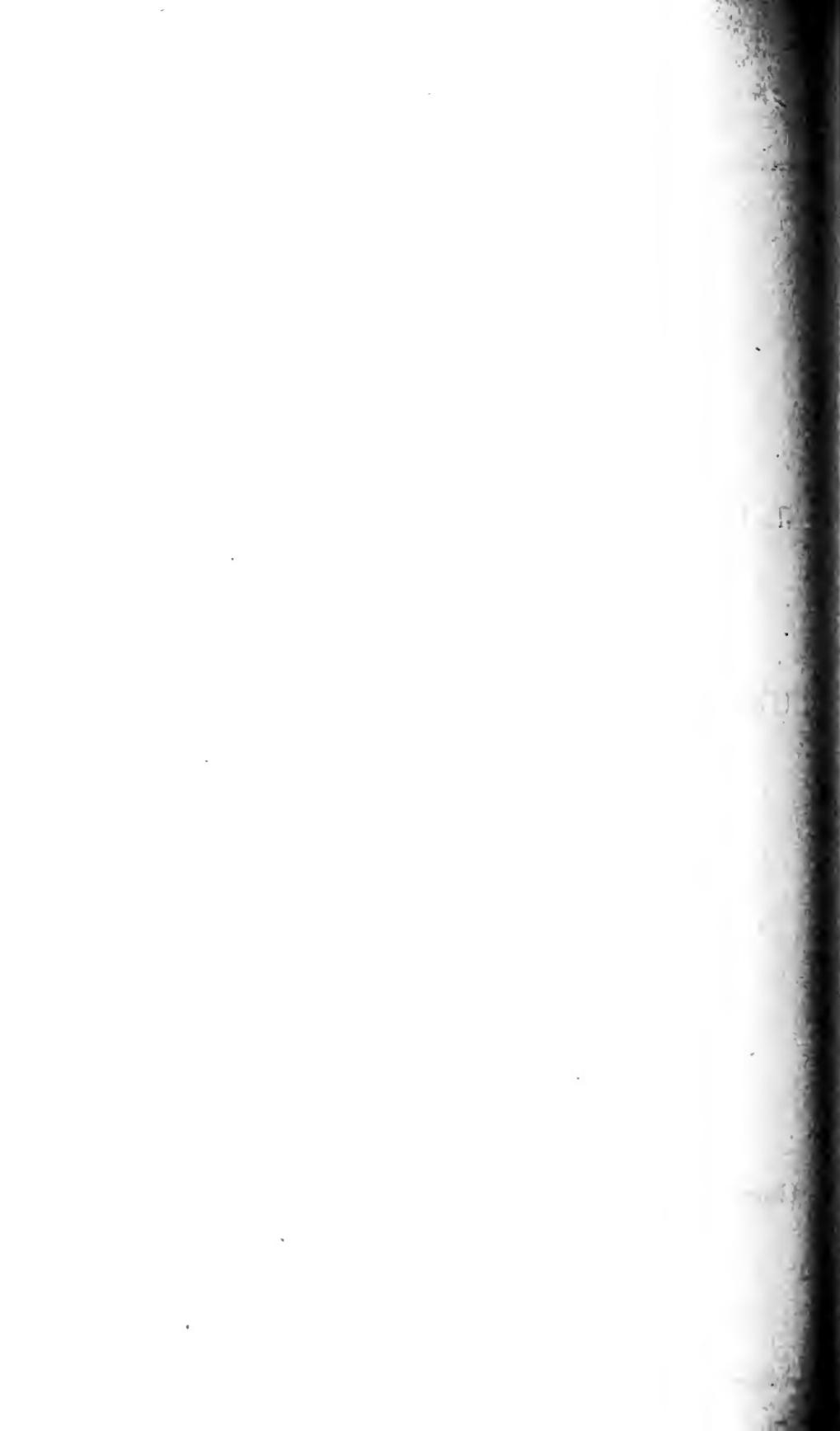
Appellants,
vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record
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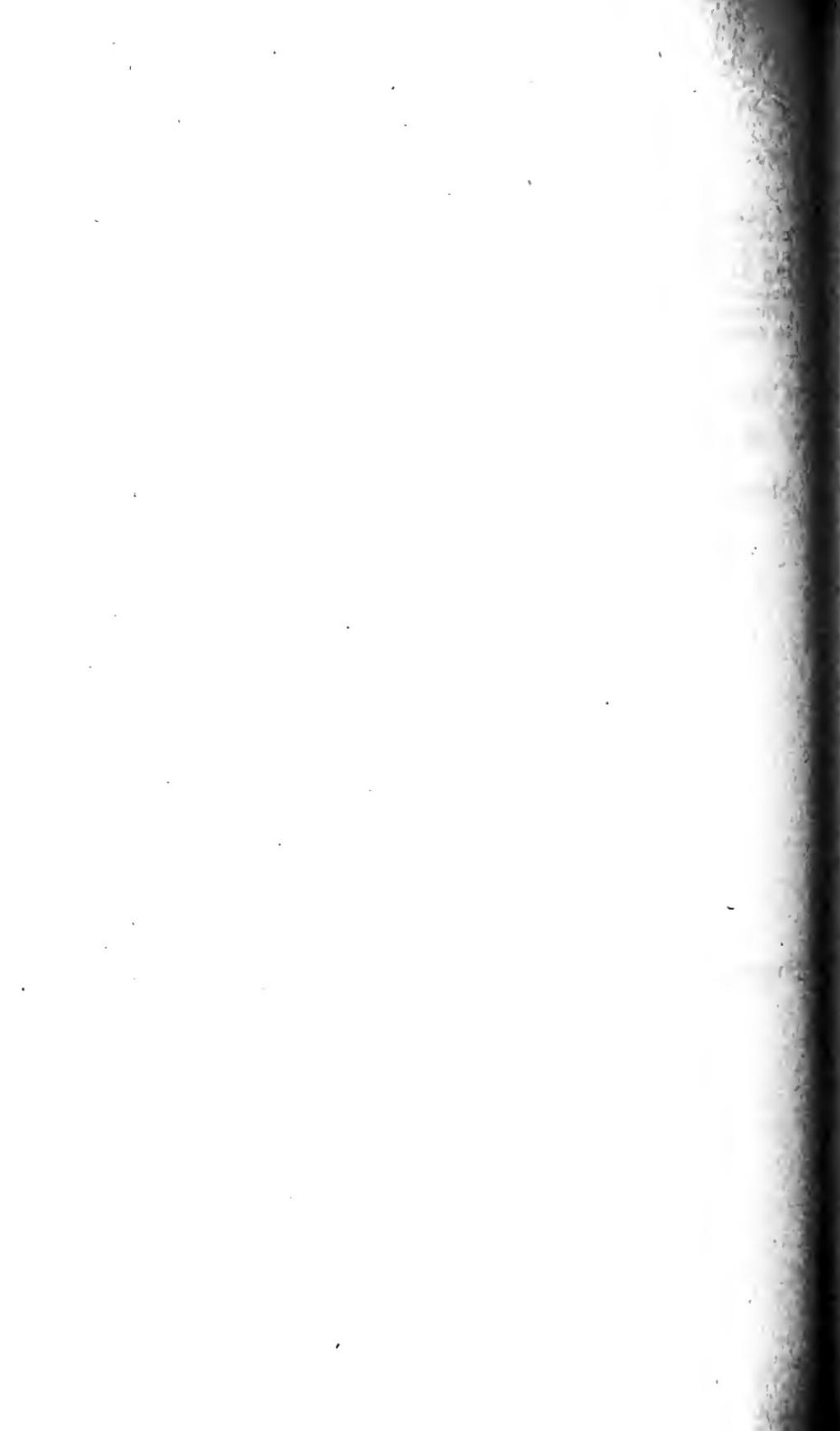
Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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At a stated term, to wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the fourth day of April in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Ralph E. Jenney, District Judge.

No. 14,943-RJ Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,

Defendants.

This cause coming on for further trial by jury of defendants J. Howard Edgerton, Russell, W. Starr, Edward C. Thomas, Joseph L. Smale, Alfred R. Ireland, Clifford W. Twombly, and Charles L. Cronk; Walter M. Campbell, Assistant U. S. Attorney, appearing as counsel for the Government; Gordon Lawson, Esq., appearing as counsel for Defendants Edgerton and Ireland; J. J. Irwin, Esq., appearing as counsel for Defendants Starr, Thomas, and Smale; Francis D. Adams and Ardene D. Boller, Esqs, appearing as counsel for Defendant Twombly; J. Lamar Butler, Esq., appearing as counsel for Defendant Cronk; and A.

Wahlberg, Court Reporter, being present and reporting the proceedings; and all of the said defendants being present and the jury being absent,

It is stipulated by all counsel that the jury may be sent to lunch now without being brought into court and that the Court may deliver to the jury the transcript of all of the Court's instructions heretofore given.

The Court adjourns until such time as the jury returns a verdict.

At 5:30 P. M. court reconvenes herein, and all being present as before, including the defendants, the jury returns into court. The Court inquires of the foreman if there is something they wish to ask the Court. The jury, though their foreman, state they have agreed upon verdicts as to three of the defen- [1*] dants only. The Court directs the jury to hand the verdicts to it, and the jury having done so, the Court directs the clerk to read them; whereupon, the clerk reads them, and the Court orders that the said verdicts be filed and entered herein, being as follows:

* Page numbering appearing at foot of page of Original Supplemental Transcript of Record.

In The District Court of the United States, South-
ern District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES L. CRONK, et al.,

Defendants.

VERDICT OF THE JURY AS TO
DEFENDANT CHARLES L. CRONK

We, the Jury in the above entitled cause, find
the defendant, Charles J. Cronk, not guilty, as
charged in the first count of the Indictment; and
not guilty, as charged in the second count of the
Indictment; and

not guilty, as charged in the fourth count of the
Indictment; and

not guilty, as charged in the fifth count of the
Indictment; and

not guilty, as charged in the sixth count of the
Indictment; and

not guilty, as charged in the seventh count of the
Indictment; and

not guilty, as charged in the eighth count of the
Indictment; and

not guilty, as charged in the ninth count of the
Indictment; and

not guilty, as charged in the tenth count of the
Indictment; and

not guilty, as charged in the eleventh count of the Indictment; and
not guilty, as charged in the twelfth count of the Indictment; and
not guilty, as charged in the thirteenth count of the Indictment; and [2]
not guilty, as charged in the fourteenth count of the Indictment; and
not guilty, as charged in the fifteenth count of the Indictment.

FRANK A. MORGAN,
Foreman of the Jury.

Dated: Los Angeles, Calif.,
April 4, 1942.

[Endorsed]: Filed Apr. 4, 1942.

In The District Court of the United States, South-
ern District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD W. TWOMBLY, et al.,

Defendants.

VERDICT OF THE JURY AS TO
DEFENDANT CLIFFORD W. TWOMBLY

We, the Jury in the above entitled cause, find the defendant, Clifford W. Twombly, guilty as

charged in the first count of the Indictment; and
guilty, as charged in the second count of the In-
dictment; and
guilty, as charged in the fourth count of the In-
dictment; and
guilty, as charged in the fifth count of the Indict-
ment; and
guilty, as charged in the sixth count of the Indict-
ment; and
guilty, as charged in the seventh count of the In-
dictment; and
guilty, as charged in the eighth count of the Indict-
ment; and
guilty, as charged in the ninth count of the Indict-
ment; and [3]
not guilty, as charged in the tenth count of the
Indictment; and
not guilty, as charged in the eleventh count of the
Indictment; and
not guilty, as charged in the twelfth count of the
Indictment; and
not guilty, as charged in the thirteenth count of
the Indictment; and
not guilty, as charged in the fourteenth count of
the Indictment; and
not guilty, as charged in the fifteenth count of the
Indictment.

FRANK A. MORGAN,
Foreman of the Jury.

Dated: Los Angeles, Calif., April 4, 1942.

[Endorsed]: Filed Apr. 4, 1942.

In The District Court of the United States, South-
ern District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. HOWARD EDGERTON, et al.,

Defendants.

**VERDICT OF THE JURY AS TO
DEFENDANT J. HOWARD EDGERTON**

We, the jury in the above-entitled cause, find the defendant, J. Howard Edgerton, guilty as charged in the first count of the Indictment; and
guilty, as charged in the second count of the Indictment; and

guilty, as charged in the fourth count of the Indictment; and

guilty, as charged in the fifth count of the Indictment; and [4]

guilty, as charged in the sixth count of the Indictment; and

guilty, as charged in the seventh count of the Indictment; and

guilty, as charged in the eighth count of the Indictment; and

guilty, as charged in the ninth count of the Indictment; and

not guilty, as charged in the tenth count of the Indictment; and

guilty, as charged in the eleventh count of the Indictment; and
guilty, as charged in the twelfth count of the Indictment; and
guilty, as charged in the thirteenth count of the Indictment; and
guilty, as charged in the fourteenth count of the Indictment; and
not guilty, as charged in the fifteenth count of the Indictment.

FRANK A. MORGAN
Foreman of the Jury.

Dated: Los Angeles, Calif.,
April 4, 1942.

[Endorsed]: Filed, Apr. 4, 1942.

Polling of the jury is waived as to Defendants Cronk and Twombly. The jury is polled as to the verdict on Defendant Edgerton and each juror states that it is his verdict.

It is ordered that Defendant Charles L. Cronk be, and he is, discharged and his bond, if any, be, and it is, exonerated. It is ordered that whatever bail Defendants Clifford W. Twombly and J. Howard Edgerton may have may remain in effect pending further order of the Court. [5]

The jury, through their foreman, further state that they have agreed upon certain counts as to each of the remaining defendants, but are unable to agree as to certain other counts as to each of the

said defendants. The Court inquires of each juror as to whether in his opinion they could not come to an agreement if given more time for deliberation, and each juror states that he does not believe they would be able to come to an agreement. Whereupon, the Court directs the jury to retire (in the custody of the bailiffs) and await the instructions of the Court.

The jury retires to the jury room, and, in their absence, the Court and respective counsel discuss the situation and it is stipulated that the jury be not required to deliberate further.

The Court instructs the jury, through the bailiff, to bring in their verdicts as to the counts agreed upon and to make a return of "Disagreed" as to those counts upon which they have been unable to agree.

At 5:50 P. M. the jury returns into court, and all being present as before, and all the defendants being present, the Court directs the jury to hand their verdicts to it, and the jury, through their foreman, hand their verdicts to the Court and the Court directs the clerk to read said verdicts; whereupon, the clerk reads them, and it is ordered that the said verdicts be filed and entered herein, to wit:

In The District Court of the United States, Southern District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL W. STARR, et al.,

Defendants.

VERDICT OF THE JURY AS TO
DEFENDANT RUSSELL W. STARR

We, the Jury in the above-entitled cause, find the defendant, Russell W. Starr, disagreed, as charged in the first count of the Indictment; and disagreed, as charged in the second count of the Indictment; and

disagreed, as charged in the fourth count of the Indictment; and [6]

disagreed, as charged in the fifth count of the Indictment; and

disagreed, as charged in the sixth count of the Indictment; and

disagreed, as charged in the seventh count of the Indictment; and

disagreed, as charged in the eighth count of the Indictment; and

disagreed, as charged in the ninth count of the Indictment; and

not guilty, as charged in the tenth count of the Indictment; and

disagreed, as charged in the eleventh count of the
Indictment; and

disagreed, as charged in the twelfth count of the
Indictment; and

disagreed, as charged in the thirteenth count of the
Indictment; and

disagreed, as charged in the fourteenth count of
the Indictment; and

not guilty, as charged in the fifteenth count of the
Indictment..

FRANK A. MORGAN

Foreman of the Jury.

Dated: Los Angeles, Calif.,
April 4, 1942.

[Endorsed]: Filed, Apr. 4, 1942. [7]

In the District Court of the United States Southern
District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD C. THOMAS, ET AL.,

Defendants.

VERDICT OF THE JURY AS TO DEFENDANT
EDWARD C. THOMAS

We, the Jury in the above-entitled cause, find the defendant, Edward C. Thomas, disagreed, as charged in the first count of the Indictment; and

disagreed, as charged in the second count of the Indictment; and
disagreed, as charged in the fourth count of the Indictment; and
disagreed, as charged in the fifth count of the Indictment; and
disagreed, as charged in the sixth count of the Indictment; and
disagreed, as charged in the seventh count of the Indictment; and
disagreed, as charged in the eighth count of the Indictment; and
disagreed, as charged in the ninth count of the Indictment; and
not guilty, as charged in the tenth count of the Indictment; and
disagreed, as charged in the eleventh count of the Indictment
disagreed, as charged in the twelfth count of the Indictment; and
disagreed, as charged in the thirteenth count of the Indictment; and [8]
disagreed, as charged in the fourteenth count of the Indictment; and
not guilty, as charged in the fifteenth count of the Indictment.

FRANK A. MORGAN
Foreman of the Jury.

Dated: Los Angeles, Calif., April 4, 1942.

[Endorsed]: Filed, Apr. 4, 1942.

In the District Court of the United States Southern
District of California, Central Division

No. 14-943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH L. SMALE, ET AL.,

Defendants.

VERDICT OF THE JURY AS TO DEFENDANT
JOSEPH L. SMALE

We, the jury in the above-entitled cause, find
the defendant Joseph L. Smale, disagreed, charged
in the first count of the Indictment; and
disagreed, as charged in the second count of the
Indictment; and

disagreed, as charged in the fourth count of the
Indictment; and

disagreed, as charged in the fifth count of the In-
dictment; and

disagreed, as charged in the sixth count of the In-
dictment; and

disagreed, as charged in the seventh count of the
Indictment; and

disagreed, as charged in the eighth count of the
Indictment; and

disagreed, as charged in the ninth count of the
Indictment; and [9]

not guilty, as charged in the tenth count of the
Indictment; and

disagreed, as charged in the eleventh count of the Indictment; and

disagreed, as charged in the twelfth count of the Indictment; and

disagreed, as charged in the thirteenth count of the Indictment; and

disagreed, as charged in the fourteenth count of the Indictment; and

not guilty, as charged in the fifteenth count of the Indictment.

FRANK A. MORGAN

Foreman of the Jury.

Dated: Los Angeles, Calif., April 4, 1942.

[Endorsed]: Filed, Apr. 4, 1942.

In the District Court of the United States Southern District of California, Central Division

No. 14,943-RJ Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALFRED R. IRELAND, ET AL.,

Defendants.

VERDICT OF THE JURY AS TO DEFENDANT
ALFRED R. IRELAND

We, the Jury in the above-entitled cause, find the defendant, Alfred R. Ireland, disagreed, as charged in the first count of the Indictment; and

disagreed, as charged in the second count of the Indictment; and
disagreed, as charged in the fourth count of the Indictment; and
disagreed, as charged in the fifth count of the Indictment; and
disagreed, as charged in the sixth count of the Indictment; and [10]
disagreed, as charged in the seventh count of the Indictment; and
disagreed, as charged in the eighth count of the Indictment; and
disagreed, as charged in the ninth count of the Indictment; and
not guilty, as charged in the tenth count of the Indictment; and
disagreed, as charged in the eleventh count of the Indictment; and
disagreed, as charged in the twelfth count of the Indictment; and
disagreed, as charged in the thirteenth count of the Indictment; and
disagreed, as charged in the fourteenth count of the Indictment; and
not guilty, as charged in the fifteenth count of the Indictment.

FRANK A. MORGAN

Foreman of the Jury.

Dated: Los Angeles, Calif., April 4, 1942.

[Endorsed]: Filed, Apr. 4, 1942.

Polling of the jury as to said verdicts is waived.

The jury is discharged and leaves the court room.

It is stipulated and ordered that the bonds of Defendants Starr, Thomas, Smale, and Ireland, be, and they hereby are, exonerated and the said defendants are released on their own recognizance, pending further order of the Court.

Attorney Lawson, on behalf of Defendant Edger-ton, moves for judgment of not guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, and 14 of the Indictment, notwithstanding the verdict of the jury and states the grounds in support thereof. It is ordered that the motion be, and it is, denied and exception noted.

[11]

Attorney Adams, on behalf of Defendant Twom-bly, moves for judgment of not guilty on counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment notwithstanding the verdict of the jury. It is ordered that the motion be, and it is, denied, and exception noted.

Attorney Lawson, on behalf of Defendant Edger-ton, moves the Court for a new trial on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, and 14 of the Indictment, and states the grounds in support thereof and fur-ther states formal motion will be filed to conform with the rules.

Attorney Adams, on behalf of Defendant Twombley, moves the Court for a new trial on counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment, and states the grounds in support thereof and further states that formal motion will be filed to conform to the rules.

It is ordered that said two motions for new trial be placed on the calendar of Monday, April 13, 1942, at 9:30 A. M. for hearing. [12]

United States of America
District Court of the United States
Southern District of California

Clerk's Office No.....

UNITED STATES OF AMERICA

vs.

J. HOWARD EDGERTON, ET AL

SUPPLEMENTAL PRAECIPE

To the Clerk of Said Court:

Sir:

Please issue supplemental transcript of record to
the Circuit Court of Appeals as follows:

Minute orders 4/4/42.

OTTO CHRISTENSEN,

Attorney for Defendant [13]

United States District Court, Southern District of California, Central Division

No. 14943-RJ—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. HOWARD EDGERTON, ET AL.,

Defendants.

CERTIFICATE OF CLERK TO SUPPLEMENTAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing Supplemental Record pages numbers from 1 to 13 inclusive contain full, true and correct copies of Minute Order Entered April 14, 1942 and Praecipe for Supplemental Transcript which constitutes the Supplemental Transcript of Record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing supplemental transcript amount to \$6.20 which sum has been paid to me by Appellant Edgerton.

Witness my hand the seal of said District Court this 7 day of July, 1943.

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

[Seal]

[Endorsed]: No. 10136 United States Circuit Court of Appeals for the Ninth Circuit. J. Howard Edgerton and Clifford W Twombly, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 9, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10136

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES HOWARD EDGERTON,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT J. HOWARD
EDGERTON.

OTTO CHRISTENSEN,

1016 Broadway Arcade Building, Los Angeles,

GORDON LAWSON,

211 West Seventh Street Building, Los Angeles,

Attorneys for Appellant J. Howard Edgerton.

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No. 10136

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT J. HOWARD
EDGERTON.

STATEMENT OF BASIS OF JURISDICTION.

This is an appeal from a judgment rendered against the appellant Edgerton by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellant guilty of violating Section 338, Title 18 U. S. C. (commonly known as the Mail Fraud Statute) as charged in Counts 1 and 2, 4-9, 11-14 of Indictment filed in said Court on June 18, 1941. These counts of the Indictment charged a substantive offense. [Indictment R. 3-39; Verdict R. 52; Judgments R. 58.] The appellant was sentenced to a term of imprisonment of $2\frac{1}{2}$ years on each of Counts 1, 4, 6, 8, 11 and 13, said sentences to run concurrently with each other, and placed on probation for a period five years on each of Counts 2, 5, 7, 9, 12 and 14,

the probation periods to run concurrently with each other and commencing at the expiration of the service of sentence on Count 1 [R. 58-60].

Thereafter, the appellant duly filed his Notice of Appeal from the said judgment against said appellant within the time prescribed by law [R. 61].

Thereafter, appellant duly filed an Assignment of Errors within the time prescribed by law [R. 1050-1189].

Thereafter, a Bill of Exceptions containing all of the evidence in this case, the instructions of the trial court and all proceedings subsequent to trial, was prepared and filed [R. 74-1048].

Thereafter the record in this case, including said Bill of Exceptions and certain Exhibits separately and directly certified, was filed with the Clerk of this Honorable Court, together with a statement of points to be relied upon on appeal [R. 1191], which points are identical with the Assignment of Errors [R. 1050-1189].

STATEMENT OF THE CASE.

Issues Presented by the Indictment.

The counts of the Indictment under which appellant Edgerton and one of the other defendants on trial was convicted, and pursuant to which judgment was entered, charged this appellant and the defendants Russell W. Starr, Edward C. Thomas, Joseph L. Smale, Alfred R. Ireland, Clifford W. Twombly, and Charles L. Cronk with having "devised and intended to devise a scheme and artifice to defraud and for obtaining money and property * * * from investors in the Railway Mutual Building and Loan Association, * * * who had theretofore con-

verted and transferred their investments in the said Railway Mutual * * * into securities of the First Security Deposit Corporation * * * by means of false and fraudulent pretenses, representations and promises, which said scheme and artifices was * * * as follows," [R. 4-5]: The scheme and artifice then set forth is that, following the organization of the First Security Deposit Corporation in November of 1931,

(a) the defendants "for the pretended and alleged purpose of liquidating the assets of the said Railway Mutual * * * induced the persons intended to be defrauded to exchange their securities in the said Railway Mutual * * * for securities issued by the said First Security * * *;" that as a result of this exchange the First Security became the beneficiary of certain assets of the Railway Mutual, said assets being of an equivalent book value to the securities issued by the First Security, which assets were placed in trust with the Metropolitan Trust Company and were releaseable only upon surrender of bonds and securities of the First Security for cancellation [R. 6-7], and "that the defendants at all times represented and pretended that First Security * * * was organized for the purpose of * * * and actively engaged in the liquidation of the said assets received by it from the Railway Mutual * * *; whereas, * * * no such liquidation was in fact being carried into effect * * *" [R. 8];

(b) that the defendants "did depress and cause to be depressed the market price of the securities of the First Security so that defendants might and did acquire the same * * * at prices greatly reduced * * *" [R. 8];

(c) that the defendants "under the pretense of loans, and by divers * * * ways * * * unknown, did convert and divert to their own use * * * money and property of the said First Security * * *" [R. 8]; and,

(d) that the defendants "would and did represent * * * the First Security * * * would and did loan or advance money only upon securities or properties theretofore approved as legal investments by the superintendent of banks or the commissioner of corporations of the State of California, whereas, in truth and in fact * * * large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to the Investment Finance Co., for the use and benefit of the defendants without any security whatsoever." [R. 9.]*

The only false and fraudulent pretenses, representations and promises alleged to have been made to that class of persons intended to be defrauded were two:

1. The First Security was organized for and engaged in the liquidation of the Railway Mutual assets, and
2. The First Security would loan money only upon security or properties theretofore approved as legal investments.

These are the only false representations alleged. It will be noted that they are repugnant, *i. e.*, engaging in the business of loaning money is inconsistent with actively liquidating assets. The allegation with reference to liqui-

*The above underscored allegation of the Indictment the Court ordered stricken from the Indictment [R. 991-992, 999-1000].

dation is of the assets that were “placed * * * with the Metropolitan Trust” [R. 6, 8].

The essence of the scheme to defraud, to avoid repugnancy, is one of inducing Railway Mutual security holders to exchange their holdings for securities of the First Security upon a plan that the assets of the Railway Mutual placed in trust would be liquidated, in proportion to the securities of the First Security from time to time surrendered to the Metropolitan for cancellation, and that the First Security would with its cash resources only loan money upon “approved * * * legal investments,” whereas the defendants loaned and diverted the funds flowing to the First Security to themselves or otherwise for their personal use and benefit without any security. There would only be consistency in these two allegations under this view, otherwise on their face they are repugnant.

The Issues Submitted to the Jury.

The Court in its instructions segregated these two alleged false representations, treating them separately, and instructed the jury that finding of either representation as having been made and as false would be sufficient to support the indictment [R. 999]. The alleged false representation with respect to loaning money “only upon security or properties theretofore approved as legal investments,” is quite different from the one submitted to the jury for determination as to its truth or falsity. By striking the words “theretofore approved as legal investments, etc.” the Court created an entirely new and different representation—he changed the charge. The jury was authorized to find the character of the false

representation, which induced the persons to be defrauded to part with their property, as something less than that which the indictment actually charged.

There was no proof that the First Security received any assets from the Railway Mutual, only that it received assets out of the Metropolitan Trust, as, if and when it deposited securities of its own issue in an amount in 10% excess, as per provisions of the trust, of the book value of the assets released.

The Court did not treat the representation concerning liquidation as one to be found by the jury as false with respect to inducing the persons holding Railway Mutual securities to exchange them for securities of the First Security, but as a continuing false representation with respect to what the First Security was doing with the assets it received from the Metropolitan Trust upon the surrender of its own securities acquired from its security holders, brokers and other sources. The Court told the jury that if it found that the defendants represented the First Security was engaging in the liquidation of the assets of the Railway Mutual received by it when as a matter of fact "no such liquidation has been carried into effect," that this alone was sufficient to support the allegation of the making of false representations [R. 1026, 999].

The jury, as we have seen, was authorized to find a verdict against the appellant upon the finding of either false representation pleaded [R. 999]. We cannot speculate as to whether the jury found both allegations of misrepresentation had been proved, or one as against the other. For ought we know the jury reached a conclusion that the allegation of misrepresentation as *amended*

by the trial court was the sole one finding support in the evidence.

Williams v. North Carolina, 87 L. Ed. 189, 191.

The allegation that the defendants under the pretense of loans converted and diverted to their own use money and property of the First Security was wholly unsupported by any evidence.

The allegation that the defendants did depress and cause to be depressed the market price of the said securities of the First Security so that they could acquire them from the persons intended to be defrauded at "prices greatly reduced," likewise finds no support in the evidence. There was no evidence as to "market price" or market value of the securities of the First Security. Without proof of some market price there was no warrant for finding that it was depressed. Before the market price can be said to have been depressed or that one's acts and conduct caused it to be depressed, there must first be evidence of a market price. Again, mere proof of a market price and that it was depressed would be insufficient to establish an offense under the Statute; there must be proof of a false pretense or representation, independent and apart from actually causing a market price to be depressed, so that one might acquire properties and securities at reduced prices. This element (representation) cannot be supported alone by actions causing a depressing of market prices, as this may be due wholly to bad business management. The Court as to this allegation instructed the jury that if they found "that a *situation* was caused whereby the persons * * * intended to be defrauded were not able to get as high a price for their securities

in the sale of them as they would have had it not been for the activities of the defendants * * * then you are at liberty to find that the defendants depressed and caused to be depressed the market price of the securities of the First Security * * * as alleged in the indictment." [R. 1033.]

The Facts in Evidence.

The Plan of Reorganization of Railway Mutual.

The Railway Mutual Building and Loan Association was organized Sept. 24, 1927 [R. 91]; in October, 1931, its Executive Committee was designated to investigate and recommend an advisable method of reorganization, resulting in a Plan, Agreement and Declaration of Trust for reorganization being entered into on November 27, 1931 [R. 200]. Under this "Plan, Agreement and Declaration of Trust", the defendants R. W. Starr, E. C. Thomas and L. S. Edwards, all officers of the Railway Mutual, were named "as trustees" [R. 193]. They also were named as the reorganization committee in said agreement and also designated as managers thereof [R. 299-200]. There were three parties to this Plan and Agreement, the first being the trustees and managers, the second the depositors of securities, and the third the First Security Mortgage Company. (This name was changed to First Security Deposit Co.) [R. 299-300]. However, the depositors as such did not sign, the document being executed by the said R. W. Starr, E. C. Thomas and L. S. Edwards as "Co-managers" and by the First Security Mortgage Corporation, by R. W. Starr, President and L. S. Edwards, Secretary [R. 314]. The "Plan, Agreement and Declaration of Trust for the reorganization of the Railway Mutual Building and Loan

Association", first, generally recites the reasons for the reorganization, *i. e.*, adverse conditions created by the activities of promotional groups exploiting building and loan associations, the resulting effect of the new Building and Loan Act of California, effective August 14, 1931, upon building and loan associations and the changing economic conditions, making it advisable to adopt a new legal structure and convert a portion of the assets of the Railway Mutual into a savings and loan corporation [R. 291-294]; it then recites that a new corporation has been organized in California, known as First Security Mortgage Corporation, which would engage in the business of "loaning and advancing money and to take as security therefor securities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations . . . and to operate a general savings and mortgage business" [R. 295].

This Plan and Agreement contemplated that the said trustees were to receive for deposit the securities of the Railway Mutual, and that the newly formed corporation would issue its securities to be transferred to the individuals depositing their Railway Mutual securities; that securities of the First Security would be issued in equal amounts for securities of the Railway Mutual so deposited [R. 178-192] and that the security holders of the Railway Mutual would participate in the new corporation to the same extent and with the same privileges and burdens as were granted to or cast upon them as said security holders under the Railway Mutual [R. 179-182]; that the securities of the Railway Mutual would be deposited with the trustees under the Trust agreement which would con-

stitute the corpus of the trust estate until physical assets, such as notes, mortgages, deeds of trust, etc., owned by the Railway Mutual would be deposited with the trustee in lieu of the securities of the Railway Mutual [R. 182]; that this exchange of physical assets would be made at their book value [R. 183]; that the Railway Mutual Investment Certificates would receive Collateral Trust Bonds or Certificates of the prior classification from the First Security of an aggregate face value equal to the book value of such an investment certificate at the time of exchange.

Broad powers were granted under the Plan and Agreement to the trustees and managers. They were given the power to declare the Plan operative as to all or any class or classes of securities and obligations, construe the Plan and the "construction thereof or action thereunder as determined by the Trustees and Managers, shall be final and conclusive in effect", and under certain conditions could modify and change the Plan [R. 296-298]. The Reorganization Agreement was made a "part of the Plan", "which shall be construed together as parts of one and the same instrument"; the managers were to endeavor to carry the Plan into practical operation either in its entirety or in part to such an extent and in such manner and with such additions, exceptions and modifications as the managers shall deem to be for the best interest of the depositors or of the properties finally embraced in the Plan [R. 299-302].

The managers could organize one or more new companies whenever and wherever in their discretion they may determine, or may adopt, or may use any existing or future companies, and may cause to be made such

consolidations, mergers, leases, sales or other arrangements, make such conveyances or transfers of any properties or securities acquired, and take such other steps as they may deem proper for the purpose of creating the new securities provided for in the plan and carrying out all or any of the provisions thereof [R. 304]. They could cause the ownership of all or any property of the corporation to be either a direct ownership or ownership through bonds or shares of stock, or both, of any other company; and cause any purchase money mortgage or any mortgage or lien in renewal thereof, but not in excess of the amount of those then existing on property securing securities of or assumed by the corporation or any of its allied, constituent, controlled or subsidiary companies, to be either a direct lien upon any particular property or a lien upon bonds or shares of stock of any company owning such property; consent to and approve, upon such terms and conditions as they shall prescribe any modification or amendment of any bond or obligation of the corporation or any of its subsidiary or affiliated companies and/or the mortgage or indenture on which they were issued.

That in case any separate plan shall in the opinion of the managers become expedient to effect the reorganization of any subordinate or other company or as to any property of the Association (Railway Mutual) the managers may promote and participate in any such reorganization and may deposit thereunder any securities thereby affected; that the managers may effect such mergers or consolidations of allied, constituent, controlled, or subsidiary companies, or other companies constituting a part of the properties and assets of the Association (Railway Mutual) or its allied constituent, controlled or sub-

sidiary companies as they may deem advisable and organize or utilize one or more subsidiary or affiliated companies for the purpose of acquiring or holding any properties or securities subject to the reorganization or acquired under this plan [R. 304-306]. It was provided that the managers may form or procure the formation of any syndicate or syndicates which they may deem advantageous for carrying out the purposes of the plan and agreement, and may act as managers of such syndicate or syndicates and may act as directors and officers of the corporation or any other companies organized to carry out the purposes of the plan and may act so in association with others. The managers were not to be disqualified from holding any office in such other companies and receiving compensation therefor [R. 308].

The managers could in their discretion form additional groups to underwrite the participation in the plan of any class or classes of securities, obligations or claims, or to provide the cash or other funds required to make any purchase of existing securities, obligations or claims which the managers deemed advisable, or to provide the cash or other funds required which would be payable to any holders of securities, obligations or claims upon any sale or sales of the properties involved, or for any other purpose deemed advisable [R. 309].

The enumeration of the specific powers thereby conferred were not to be construed to limit or to restrict the general powers conferred; that in all respects any and all powers which the managers deemed expedient in or towards carrying out or promoting the purposes of the plan and agreement in any respect even though such power be apparently of a character not presently con-

templated was conferred on the managers [R. 309-310]. The "Managers" were empowered to construe the plan and agreement, their construction thereof or action thereunder being conclusive; they were authorized to supply any defect or omission and reconcile any inconsistency in such manner and to such extent as they deemed expedient to carry out the same effectively, and were made the sole and final judges of such expediency [R. 311].

Two years was provided within which to declare the plan operative unless the time was extended by the managers and by the Board of Directors of the Corporation (First Security) [R. 313].

This Plan, Agreement, and Declaration of Trust is not signed by the depositors, but was executed by the managers and the First Security Mortgage Corporation [R. 314]. It was stipulated this document was executed and became effective without the signatures of the depositors; that a "consent" was signed by depositors and this constituted the depositors execution of the document [R. 314].

There was no evidence of any depositor at any time having examined this Plan, Agreement and Declaration of Trust; whatever information they had concerning it came from a brochure circulated among the security holders of the Railway Mutual [R. 324].

The Activities of the Reorganization Committee and Plan Managers.

The attorneys for the reorganization committee of the Railway Mutual were Haight, Mathes & Sheppard, and later the firm of Haight and Trippett; they were also attorneys for the First Security Deposit Corporation. They acted as such attorneys until April 1933 [R. 324, 192].

The officers and directors of the Railway Mutual were also officers and directors of the newly organized corporation, the First Security [R. 174, 212]. Of these the defendant R. W. Starr, a doctor for the Southern Pacific Railway was President and director; the defendant J. L. Smale, Paymaster of the Pacific Electric Railway Company, Vice-President and Director; the defendant E. C. Thomas, Assistant to the President of the Pacific Electric Railway Company and head of its publicity Department, was Vice-President and Director; the defendant A. R. Ireland, who had been connected with the Pacific Electric Railway for 20 years, was a director. The other five directors who were not named as defendants were S. L. Edwards, Wm. Leffert, J. S. Borsch, and W. S. Brayton [R. 174-212]; they were either connected with the Southern Pacific Railway Company or local businessmen, with the exception of Brayton who was formerly a judge.

These officers and directors of the Railway Mutual and First Security were in the main large security and stockholders in both corporations and remained as officers and directors of the First Security with the exception of some of the non-defendants throughout the period of time covered by the indictment [R. 272].

The application of the First Security for a permit to issue securities, Sept. 10, 1932 [R. 168], recites its purpose to be to lend its funds "at a rate of interest exceeding that paid for money received by it," and that said loans "are to be made *largely* on an amortizing basis, and *are to be largely secured* by deeds of trust;" also, that it would engage in various collateral business such as acting as insurance brokers, etc. [R. 171].

A brochure was sent out by the reorganization committee to the security holders of the railway Mutual on December 5, 1931. This is the first approach made to reach the security holders of the Railway Mutual with the proposal of a plan of reorganization. It shows Haight, Mathes & Sheppard as legal counsel for the First Security and of the Plan and Agreement of reorganization. It asserts the opinion of the Committee that the best interests of the investors would be preserved by converting the "Association's structure into a mortgage company," and sets forth the basis upon which the Railway Mutual securities will be exchanged for those of the First Security. Aside from the basis upon which securities will be exchanged no detail of the plan and agreement is set forth. The document recites that the reorganization committee "reserves all its rights and powers under the Plan and Agreement, including the right to amend the same in respect of the treatment of securities deposited thereunder or otherwise, as provided in said Agreement," and then states "original and duplicate copies of the Plan and Agreement are on file for inspection," at the Railway Mutual and Headquarters of Reorganization Committee, "and reference is here made to same for a statement of the full terms and conditions thereof and the powers and authority of the undersigned Reorganization Committee" [R. 324, 330].

Neither in this initial document to the security holders of the Railway Mutual or any communication thereafter, either written or oral, was any reference made that the Plan and Agreement of reorganization stated the purpose of the First Security to be one of "loaning or advancing money and to take as security therefor securities or prop-

erties which shall be approved as appropriate legal investments by the Superintendent of Banks," etc. Subsequent communications do make reference to the conditions existing in the building and loan "field," the handicaps under which those engaged in that field were laboring under, the effect of moratorium legislation and amendatory legislation to the Building and Loan Act, and the advisability of changing the form of the corporate structure of a building and loan to a more flexible one of a company engaging in the mortgage business. None of these documents and letters make any representation that the Plan and Agreement contemplated, or that it was the purpose of said Plan and Agreement and/or the First Security, to liquidate the assets of the Railway Mutual [R. 324, 338].

The Reorganization Committee announced that as of April 1932, 70% of outstanding securities of the Railway Mutual had been deposited with it and declared the plan operative [R. 336]. On October 5, 1932, the Reorganization Committee announced that a permit had been issued by the Corporation Commissioner to the First Security to issue its securities in exchange for the securities of the Railway Mutual in accordance with the provisions of the Plan and Agreement for reorganization and that delivery of securities of the First Security would commence on October 15. 1932 [R. 338].

As we have seen, the Plan was to convert a portion of the assets of the Railway Mutual "into a mortgage corporation enjoying all of the advantages of the mortgage corporations, generally," and avoid "being handicapped by the conditions existing in the building and loan field" [R. 180, 332, 333]. No charge was contained in the Indict-

ment that this was a false representation and the plaintiffs made no such contention.

There is no evidence in the record that any representative of the Reorganization Committee or the First Security called upon any of the Railway Mutual investors and made any representations whatsoever concerning the Plan and Agreement and Declaration of Trust for the reorganization of the Railway Mutual; nor is there any evidence in the record that any representative of either the Railway Mutual or the First Security solicited anyone in person to exchange their Railway securities for those of the First Security.

The Operation of the Plan of Reorganization.

Following the Committee declaring the Plan operative and the issuance of the securities of the First Security for those of the Railway Mutual on deposit in the fall of 1932 [R. 337, 338] and prior to the segregation and division of the physical assets of the Railway Mutual and deposit thereof with the Metropolitan Trust in proportion to the amount of Railway securities deposited under the Plan (and in lieu of such Railway securities), the source of income of the First Security was its pro rata share of the income of the Railway Mutual.

The Railway Mutual income was reduced as a result of moratorium legislation—this legislation reduced the interest rate charged borrowers and established a moratorium “under the terms under which payments on principal being received from borrowers” was reduced. Plaintiff’s witness Perkins testified there was a 12% reduction in income on mortgage loans as a result of legislative action [R. 240]. This resulted in exten-

sions of the maturity dates of the First Security collateral Trust Bonds and notes for various periods pursuant to their terms [R. 339, 369, 226-231, 236].

Communications of the First Security to Its Security Holders.

In form letters announcing these extensions or those making payments of interest and principal to the security holders this condition was called to their attention, as well as the fact that certain enabling legislation had been enacted permitting segregation of assets of a building and loan association upon the consent of 75% in value of securities of an association to a Plan of reorganization; also attention was called to the general economic conditions and the effect thereof upon real estate values, the extensiveness of real estate mortgage foreclosures and the need of a general improvement in economic conditions and recovery of real estate values in order to solve the company's problems [R. 341-369].

There was no mention that the First Security was organized for the purpose of liquidating the physical assets of the Railway Mutual. On the contrary, reference is repeatedly made to the advantages which would accrue to the First Security following the segregation of assets, *i. e.*, restoration of interest rates to be written into existing loan contracts, liquidation of repossessed properties through exchanges for bonds with a corresponding decrease in outstanding obligations of the First Security, placement of the company's outstanding obligations on a sound financial basis which would admit of normal liquidation without sacrifice thus enabling the company to take advantage of any recovery in real estate values, and that the "*time is closely approaching when the company can*

resume active operation as a going institution.” [R. 347, 348].

The foregoing extensions were made and communications sent during the year 1933 and early in 1934. On April 19, 1933 the minutes of the First Security disclosed action by the Board extending the interest on short term notes and one-third of the principal due for a period of 120 days because of the financial condition “of the corporation at the present time”; that “advice from Haight & Trippet, attorneys for the corporation relative to present and future procedure was read, its provisions concurred in by the Board of Directors, and provisions therein not already complied with were ordered placed in effect. In line with recommendations of the attorneys, the following letter was ordered sent to all holders of short term notes due and payable May 1” [R. 237-239].

Appellant Edgerton’s Identification With First Security.

Plaintiff’s witness Drozda testified that he re-identified himself with the First Security on March, 1933; that he became manager of the company in 1934, succeeding Mr. Barry [R. 405]. The minutes of June 4, 1934, show that Drozda was appointed General Manager; that the defendant Twombly was at the meeting of the Board of Directors on Oct. 29, and was appointed General Manager to succeed Drozda, effective Nov. 1, 1934 [R. 408-409]. Mr. Drozda further testified that appellant Edgerton became counsel for the corporation prior to the time of his becoming manager [R. 406]. That he would say it was in the forepart of his employment; that he can’t place the time definitely [R. 404]. During the period of time that

he acted as Manager Mr. Edgerton was legal counsel for the company and all legal problems would be referred to him [R. 406]; that Mr. Edgerton performed legal services in connection with the segregation and division of the assets between the Railway Mutual and the First Security; that from time to time questions arose in connection with the trust. Mr. Edgerton would handle these legal problems with the Metropolitan Trust Company. Also, there were many legal problems in connection with the sale of properties and exchanges, foreclosures, taxes, delinquencies, etc. [R. 407] which were handled by Mr. Edgerton. That whenever he needed legal advice in connection with the affairs of the company he would go to Mr. Edgerton for an opinion.

The first identification of the Appellant Edgerton with either the First Security or Railway Mutual in point of time occurs on September 25, 1933; the minutes of the Railway Mutual of that date recite that in addition to the directors, Mr. Edgerton was present as legal counsel. A resolution was adopted directing the Reorganization Committee named in the Plan and Agreement to petition the Building and Loan Commissioner for a separation and segregation of the assets in accordance with the Plan and Agreement [R. 198-200]. A stipulation, however, appears in the record that Mr. Edgerton acted as attorney from March 1933 to December 31, 1940 for the First Security, but this is contradicted by the evidence which shows that Haight & Trippet were acting as its attorneys on or about April 19, 1933 [R. 272, 236, 239].

Thus it will be noted that Mr. Edgerton did not become identified in any manner with these two companies until long after the formulation of the Plan and Agreement

of reorganization. Representations made with respect to the nature and character of this Plan of Reorganization, the securities of the depositors in the Railway Mutual exchanged for those of the First Security; these occurred long before Mr. Edgerton became attorney for the company. The company was already beset by the problems of reduced income, legally reduced interest rates, moratoriums on principal amounts due, and in the throes of the then current severe general economic depression and deflation, when the appellant Edgerton became identified with it.

The defendant Twombly became General Manager of the First Security on November 1, 1934 and functioned in that capacity until Sept. 21, 1938, being succeeded by Mr. Edgerton on October 19, 1938, who served until Dec. 31, 1940 [R. 409, 274, 272]. Mr. Edgerton was not a director of the company, had no common stock interest in it at any time and only became a minor preferred stockholder in 1939. Jointly with his wife, he had 579 shares out of a total of 12,604 [R. 281, 285, 286].

The defendant R. W. Starr served as President from December 4, 1931 to February 15, 1939, as a director from December 4, 1931 to December 31, 1940, as a member of the Executive Committee from November 11, 1932 to December 31, 1940, as a member of the Securities Committee from February 21, 1934 to December 31, 1940. The defendant Smale served as Executive Vice-President from December 4, 1931 to September 20, 1933, as director from December 4, 1931 to September 20, 1933, and from February 15, 1939 to December 31, 1940, as a member of the Executive Committee from November 11, 1932 to December 31, 1940, and as President from February

15, 1939 to December 31, 1940, and at various times on committees of the corporation. The defendant A. R. Ireland served as a director from December 4, 1931 to March 15, 1933, and from February 21, 1934 to December 31, 1940, and as a member of the Finance Committee from February 21, 1934 to February 4, 1940. The defendant E. C. Thomas served as director from December 4, 1931 to December 31, 1940, as Vice-President from December 4, 1931 to February 21, 1934, as Executive Vice-President from September 20, 1933 to December 31, 1940, and as a member of the Executive Committee, the Security Committee, and other committees at various stated times. The defendant Twombly served as director from November 21, 1934, to December 31, 1938, as Secretary from November 21, 1934 to December 21, 1938; was General Manager from November 1, 1934 to September 21, 1938, and a member of the Executive Committee and Securities Committee from February 1936 to December of 1938 [R. 272].

Arrangements for Purchase of Bonds of First Security and Liquidation of Its Real Estate.

The segregation and division of assets of the Railway Mutual was ordered by the Building and Loan Commission on December 29, 1933 [R. 210, 204], in accordance with "that certain Plan and Agreement and Declaration of Trust dated November 27, 1931." These physical assets were deposited pursuant to the trust agreement with the Metropolitan Trust Co. [R. 106, 406]. The physical assets transferred were at their book value [R. 204, 210, 106].

The First Security set up a department functioning under the fictitious name of "Reality Deposit Company"

pursuant to a certificate to do business under that name dated October 24, 1933 [R. 315-317].

In a letter dated January 2, 1934, from the law office of Paul Nourse (Mr. Edgerton's employer since 1930, when he got out of law school) [R. 159], and signed by Mr. Edgerton, reference is made to "the Realty Deposit Company"; the letter recites "from our conversation the other day, it is my understanding that *you contemplate* authorizing the Realty Deposit Company which is a subsidiary department of the First Security . . . to purchase bonds of the First Security at their market value." This concept of the Realty Deposit Company was that of the management itself and not of Mr. Edgerton. The company through this subsidiary department purchased its own bonds at the market value similarly as other building and loan associations were doing [R. 317-318]. On June 30, 1934, Mr. Edgerton advised the First Security to dissolve the Realty Deposit Co. at its next board meeting and transact future business in its own name [R. 319], which was accordingly done.

The use of the Realty Deposit Company as a separate department of the First Security was first initiated for the purpose of enabling the company to build up a subsidiary real estate department with a sales staff for the sale of its own real estate, as well as that of other Building and Loan Associations and Mortgage Companies which did not have the facilities for handling and disposing of their own real estate. As a matter of policy it was deemed expedient to operate the real estate department under the fictitious name and style of "Realty Deposit Company" [R. 322-323].

The Corporation Commissioner was advised, June 30, 1940, regarding the policy of the First Security, *i. e.*, that the company, in order to facilitate the sale of real estate adopted a policy of accepting its outstanding bonds in return for real estate carried on the books of the corporation. The method used in this respect permitted a party buying real estate to turn in bonds owned by him as the full consideration for the real estate. The company when it sold real estate for cash, such transactions usually showed a loss; but when it sold for cash it would then use the cash funds in buying its outstanding bonds on the open market from a licensed stock broker offsetting the loss sustained in these cash transactions by the profit made by the purchase of bonds at the prevailing market price. These bonds so purchased on the open market or received in any real estate transactions were immediately sent to the Metropolitan Trust Company for cancellation reducing thereby the outstanding obligations of the company [R. 320-321].

The First Security acquired from November 1932 to December 21, 1939, \$1,267,649.15 of its collateral trust bonds from various sources including the Investment Finance Company [R. 532, 528, 540]. As of December 31, 1939, there were outstanding only \$17,891.31 of collateral trust bonds plus accrued interest of \$4,032.17; this amount was "deposited in the Metropolitan Trust by the First Security to cover all outstanding bonds." The total securities issued by the First Security were entirely liquidated as of that date [R. 532].

A large amount of the bonds were acquired by the First Security from security holders applying the face amount of their bonds on their loans [R. 529]. Others were ac-

quired by payment of the face amount as they matured [R. 528]. Others were acquired in exchange for real estate.

During the period of August 30, 1935 to 1939 [R. 536-539, 540], the First Security acquired from the Investment Finance \$240,929.99 of said collateral trust bonds. The aggregate total face amount of bonds of the First Security acquired by the Investment Finance during its existence was broken down as follows: 1935, \$6,-376.75; 1936, \$30,184.78; 1937, \$100,238.29; 1938, \$92,-057.17; 1939, \$12,073.00 [R. 537-539]. The average rate paid in 1937 was 70.08%; in 1937, an average of 79%; and in 1939, a rate slightly above par [R. 537-539]. The defendant Cronk was active from July 1937 until the end of 1938 on behalf of Investment Finance in contacting and communicating with holders of securities of the First Security on behalf of the Investment Finance [R. 276, 543, 506-516]. All the indictment letters were letters of the defendant Cronk [R. 3-28, 32-39]. The alleged victim witnesses who sold their securities testified they had received communications from Mr. Cronk; they sold their securities to the Investment Finance at approximately the above rates [R. 455, 669, 672, 681, 695-696, 702, 706, 709, 723, 728, 740, 748, 800]. As of December 31, 1939, all of First Security outstanding securities were retired and the trust fully liquidated [R. 532].

Operations of Investment Finance Company.

The organization of the Investment Finance Company was authorized by the First Security at a meeting of its board of directors on August 31, 1935. The board concluded it was for the good of the corporation to use its

liquid assets in some active and profitable business, and to take advantage of the opportunities presented by the Personal Property Loan Brokers' Act of California. The board directed the organization of a separate corporate entity for the general purpose of conducting "a general finance business but more particularly, a business of loaning money upon personal property as security, said corporation to be capitalized at \$200,000.00 with one class of common stock . . . at a par value of \$1.00 per share . . . that the secretary be . . . authorized to purchase not to exceed \$100,000.00 worth of common stock . . . at such time and times as he may deem necessary for the best interests of this corporation and the new one to be formed" [R. 372]. As we have seen, the appellant Edgerton was not on the board of directors of the First Security, and he was not present at the meeting authorizing the organization of the Investment Finance [R. 272, 371].

The First Security, at its board of directors' meeting held on November 20, 1935, authorized the secretary to loan to the Investment Finance Company \$50,000.00, and directed that the secretary "refer the matter as regards the procedure involved in the handling of the said loan or loans to H. D. Campbell for his opinion" [R. 373-374], a certified public accountant [R. 620]. Mr. Edgerton was not present at this meeting, nor was the matter of handling of loans of the First Security to the Investment Finance referred to him as attorney for the company.

The Investment Finance was incorporated on August 30, 1935, and dissolved August 31, 1940 [R. 275]. The defendant Starr (president of the First Security) was

president of the Investment Finance, a director, and member of the Bond Committee. The defendants, Smale, Ireland, and Thomas, directors and officers of the First Security, were directors of the Investment Finance. The defendant Twombly was director, secretary-treasurer, Investment Finance from its incorporation to December 21, 1938, and General Manager until Sept. 21, 1938. The appellant Edgerton was a director and vice-president from September 5, 1935 to March 1, 1938, and General Manager from October 19, 1938, to August 31, 1940, and attorney for the company [R. 275-276]. The offices of the First Security and Investment Finance were jointly conducted at the same address [R. 795].

Originally, the Investment Finance Company issued a thousand shares to the First Security, and ten qualifying shares to each of its directors; as of August 18, 1937, and thereafter until dissolution, there was outstanding 31,398 shares, and as of that date there was standing in the name of the defendant R. W. Starr 8,422 shares, the defendant A. R. Ireland 6,900 shares, the defendant C. W. Twombly 260 shares, the defendant E. C. Thomas 1,410 shares, the defendant Smale 2,690, and the appellant Edgerton 2,109 [R. 560-561, 287].

Upon the dissolution of the Investment Finance, August 31, 1940, the balance of its indebtedness to the First Security, \$250,465.80., was retired as of that date by the assets of the Investment Finance being transferred to the First Security [R. 640]. The assets so transferred were \$266,723.76 [R. 641].

On May 20, 1936, the board of directors of the First Security authorized its secretary-treasurer, the defendant Twombly, and its president, the defendant Starr, to vote

the stock owned by it in the Investment Finance Company [R. 580, 272, 275].

After the organization of the Investment Finance, the First Security loaned to it moneys and assets at book value. As of January 1937 the balance of its borrowings of cash and assets after repayments amounted to \$211,-110.19. As of August 1937 the balance amounted to \$246,884.07 [R. 563-566]; by December 31, 1937, the balance was \$244,705.51 [R. 566]; by May of 1939, the balance due was \$208,829.96 [R. 571]. The total of such loans of cash and other assets throughout the period amounted to \$450,946.39, leaving a balance due after repayments of \$250,465.80 as of March 1940 [R. 573]. In addition, interest was paid by cash or other credits in the amount of \$29,793.07 [R. 574] at rates of 3% and 6% respectively [R. 571]. The assets borrowed were trust deeds, real estate, etc. These were charged to the account of the Investment Finance at the book value at which the First Security carried them on its books [R. 575, 581-582].

The repayments by the Investment Finance to the First Security were made in the main with the collateral trust bonds of the First Security for which credit was given in the face amount; also, some repayments were in cash [R. 590-592]. There was no requirement of the Investment Finance to return any of the assets borrowed; the valuation as carried on the books of the First Security was transferred and added to the indebtedness of the Investment Finance to the First Security [R. 633-634].

The approximate high point of the First Security loans to the Investment Finance Company was at a time when

the First Security was the sole owner of the outstanding stock of the Investment Finance Company [*supra*, pp. 27, 28].

Over objection, plaintiff was permitted to show the business activities, loans, and investments of the Investment Finance Company. These were admitted by the Court as being material on the allegations of the indictment "which say the money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department and . . . I am permitting this evidence to go as being material to the plaintiff's case in connection with that allegation" [R. 861], and "it is simply under the one matter alleged in the indictment, namely, that this corporation invested in other than securities which were indicted in its representation" [R. 857]. Ultimately, the Court amended the indictment by striking this allegation [R. 991, 1000], but denied the motions to strike this evidence.

There is nothing charged in the indictment that any representations were ever made to any security holder of the First Security or any other person respecting the organization of the Investment Finance Company or its purpose as reflected by the above minutes of August 21, 1935 [*supra*, p. 25], or that a greater interest rate could be received by engaging in the business of making personal property loans under the Property Loan Brokers' Act, or otherwise, or is there any evidence that any representations were made to this effect.

The minutes of the Investment Finance, October 13, 1936, relate to a proposal to acquire jointly with Battelle-Dwyer a controlling interest in the American National Bank of Santa Monica. On October 21, 1936, the minutes

of the Investment Finance reflect a motion adopted to purchase 100 shares American National Bank of Santa Monica for \$15,000.00, and a loan to Battelle-Dwyer and Company of \$25,000.00, secured by 167 shares of American National Bank stock. On November 9, 1936, the board of directors ratified a voting trust dated November 4, 1936, signed by the defendant Starr as president, and the defendant Twombly as secretary [R. 375, 376-377].

The plaintiff was permitted to show over objection that the assets transferred by the Investment Finance as of August 31, 1940, upon its dissolution, to the First Security, consisted of "notes receivable, \$44,010.02; obligations of the Pacific Brick Company, \$38,415.33; obligations of the Bond-17 Dog Food Company, \$111,018.81; obligations of the American Building and Investment Company, \$19,339.74; stock of the American National Bank of Santa Monica, \$23,646.00; stock of the First Security Deposit Corporation, \$29,984.80; second trust deeds, \$28.67; furniture and fixtures, \$12.67; prepaid expense, \$17.47; suspense, which is the reserve for contingencies, \$250.25; total, \$266,723.76" [R. 641].

The plaintiff conceded that defendants went on the board of the companies to which the Investment Finance had loaned money or in which it had made investments as a matter of policy of the Investment Finance Company, with the exception of the Pierce Petroleum and the Pacific Brick Company [R. 642].

As to the Pacific Brick Company, it was conceded, the defendants who had an interest therein, had only a minority one, \$3,000.00 out of \$50,000.00 [R. 643]. The stock interest shown was in Starr and Thomas [R. 860]. The appellant Edgerton had none.

The Pacific Brick Company was organized on May 21, 1937 [R. 824]. The initial application for permit requested the issuance of 50,000 shares with par value of \$1.00 [R. 828], and the amendment requested the company be permitted to sell stock to Investment Finance Company, on the same terms it was authorized to sell shares to the persons named in the original application [R. 830-831]. As of August 20, 1937, there were outstanding shares of the Pacific Brick in the amount of 10,000, 500 of which were in the name of the defendant E. C. Thomas, and 1,410 in the name of the defendant R. W. Starr [R. 860]. There is reflected no further stock thereafter being acquired by any defendant, but that the Investment Finance Company, as of July 28, 1938 and August 5, 1938, acquired an aggregate of 21,106 shares for a consideration of \$18,313.00 [R. 866].

As to the Pierce Petroleum, the stock interest appears about fourteen months subsequent to the creation of the obligations between the Pierce and the Investment Finance. Investment Finance Journal as of December 17, 1935, shows notes receivable from the Pierce Petroleum Corporation [R. 817]; on February 19, 1937, according to the minutes of the Pierce Petroleum Corporation reflects "Edgerton 200 shares, Twombly 100 shares" [R. 819].

The Investment Finance Company, on August 12, 1938, subscribed for and bought 1,700 shares of the 25,000 shares originally issued by the American Building and Investment Company, paying therefor a consideration of \$17,000.00; according to the Application for Permit to Issue Shares, the principal business of the American Building Investment Company was investment in real

estate loans, business investments of a general nature, and financing of a general insurance agency [R. 860]. No defendant had any financial or stock interest in this company [R. 857].

The corporate purpose of Bond-17 Dog Food Company was to manufacture and sell pet food. The Investment Finance books reflect acquisition of stock of that company February 1, 1938, and on various dates thereafter to August 29th; that it acquired in that period 89,420 for a total price of \$45,826.17; and its books reflect loans made and repayments thereof from May 10, 1938 to August 8, 1940, and as of August 8th the total notes receivable amounted to “\$65,150.00, repayments not shown” [R. 863-866].

It was stipulated that none of the defendants had any stock interest at any time in either the Bond-17 Dog Food Company nor the American Building and Investment Company; also, that the appellant Edgerton had no stock interest in the Pacific Brick Company. The defendants derived no money or profits from any of these transactions [R. 868, 860].

The Situation as it Existed When Appellant Edgerton Became an Executive.

The resignation of the defendant Twombly as general manager was accepted on September 21, 1938, and the appellant Edgerton became general manager on October 19, 1938 [R. 276]; also, the defendant Twombly's services as general manager of the First Security were terminated on September 21, 1938, and the appellant Edgerton became general manager on October 19, 1938 [R. 274-275]. Shortly after the change in managers, on Decem-

ber 21, 1938, the board of directors of the Investment Finance passed the resolution that "Mr. H. Dean Campbell be employed to make an audit of the books of this company" [R. 594]. Mr. Edgerton was not a member of the board. Mr. Campbell's audit, together with the introductory report of personal conclusions and opinions, was received at the offices of the Investment Finance Company early in 1939, and at a meeting of the board of directors, March 15, 1939, a motion was passed that Mr. Campbell's "report and recommendations for the year ending December 31, 1938, be referred to our attorney who will consult with Mr. Campbell and make recommendations to the board in connection with both financial and policy matters mentioned in the report" [R. 121, 618].

The loans and investments of the Investment Finance had either been made or established prior to the appellant Edgerton becoming general manager [*supra*, pp. 31-32]. Subsequent to the report and audit of Mr. Campbell the Investment Finance Company was ultimately dissolved and its assets merged with those of the First Security, and the trust with the Metropolitan Trust Company entirely liquidated [R. 640, 532].

The Cronk Letters.

On June 24, 1937, the board of directors of the Investment Finance Company discussed the advisability of employing someone to contact the bondholders "in an effort to ascertain the advisability of liquidating the complete bond issue prior to its maturity in 1942," authorized the employment of the defendant Cronk, and the deposit of funds in a bank account to be opened in the name of

Cronk or Twombly "to cover necessary requirements for purchasing securities" [R. 277]. Thereafter, the defendant Cronk personally contacted and wrote letters to security holders during his period of employment which ended in November 1938 [*supra*, p. 25].

For the full year of 1937 Investment Finance acquired the total amount of \$100,238.29 of First Security bonds at the average rate of 70.8%; for the full year of 1938 acquired First Security bonds totaling \$92,057.17 at an average rate of 79%; and in 1939, \$12,073.00, which comprised the entire First Security Bond issue [*supra*, p. 25].

The communications of Mr. Cronk consisted of specific offers for the purchase of a security holder's securities, *i. e.*, on October 11, 1937, he wrote the witness Wright with respect to bonds aggregating \$854.20 and eleven shares of preferred, "We are able at this time to obtain for you \$619.94 on same"; and on July 5, 1938, wrote her, "You hold securities of the First Security Corporation (now in process of liquidation) . . . in the amount of \$854.20, and we are able at this time to obtain for you \$640.65 on same" [R. 450, 453]. The witness Wright sold the bonds at this price to the Investment Finance Company on August 15, 1938 [R. 455]. Similar communications were addressed to the witnesses: Morse [R. 686], Talamantes [R. 666], Bidleman [R. 713], Robinson [R. 737], Walker [R. 745]. These witnesses all sold their securities at various times at approximately seventy-five cents to eighty-five cents on the dollar [R. 695-696, 669, 706, 709, 740, 748].

Previous to the employment of Mr. Cronk, Investment Finance Company sent a communication under date of December 5, 1936, reciting, "What is the present market

value of my First Security Deposit Corporation bonds? . . . At this time we can offer . . . a cash market . . . Should you feel that you can make better use of money at this time . . . rather than waiting and endeavoring to anticipate . . . economic events . . . between now and the time these bonds mature, we will pay you a fair price for your bonds. This is a matter strictly for your own judgment. It undoubtedly will become necessary for First Security Deposit Corporation to revamp the present operating set-up, in order to cope with rapidly changing conditions, the fall in interest rates, and increased taxes. These are conditions over which neither you nor the First Security Deposit Corporation has any control." On March 30, 1937, the Investment Finance wrote, "inquiries of Security Deposit Corporation holders to our letter of December 5, 1936 were greater than we had anticipated . . . for a limited period will pay the best cash market price available to any who desire . . . changing market conditions may affect a quotation" [R. 446-448]. In the instance of the witness Wright, she inquired on April 8, 1937, asking to be advised what the "best cash market price is" [R. 449, 450], to which the Investment replied on April 13, 1937, "Able to procure the sum of \$619.94." She did not sell her securities until August, 1938 [R. 455].

Testimony Re Market Price.

The witness Wright, before she sold her securities to the Investment Finance, authorized her banker to make an investigation regarding the market value of her securities. Letters were written by her financial adviser to Los Angeles banks inquiring as to the market value of

her holdings in the First Security [R. 435-437]. The result of her investigations and those of her banker were not developed by the plaintiff, and the defendants were not permitted to develop it on cross-examination [R. 456, 435-437].

There was no evidence whatever offered by the plaintiff as to market price or value of the securities of the First Security, and all efforts of the defense to show market price were not permitted.

Plaintiff's witness Bidleman testified that he took the matter of the sale of his securities "under consideration for two to three months." When Mr. Cronk approached him and discussed the matter of the sale of his securities he told Mr. Cronk, "he didn't do business that way" . . . "I did it through the banks" [R. 718]. That he only "discussed the matter" with "the banks" . . . "I took it up with the bank in Little Falls" [R. 716]. The witness's answer that his bank made an investigation was stricken [R. 717].

Plaintiff's witness Hicks testified that aside from Mr. Cronk, a Mr. Jeffers of Long Beach sent him "some cards," and "I used to go down and talk with him . . . I had a conversation with Mr. Jeffers about the First Security in February 1938; that was before I talked with Mr. Cronk . . . Mr. Jeffers is a man who was in the commission business in Long Beach, and I used to get some cards from him" [R. 724].

Plaintiff's witness Robinson testified he had some conversations with Mr. Cronk in 1938 [R. 738], and that Mr. Cronk "told me that that price which he offered was as good a price as he could get from my securities from

any other source; I think that that was the price that was listed"; also, that "different brokers would send me a card sometimes listing what the price of it was. The price he offered me was just about the same as these brokers. I wouldn't be able to say whether the price he offered was a little bit better than the price offered by the brokers" [R. 742].

With reference to the allegation in the indictment that the defendants "did depress and cause to be depressed the market price of the securities of the First Security so that defendants might and did acquire the same at prices greatly reduced," the Court said that the allegation involved two elements: (1) That the defendants did depress the market price of securities; (2) so that defendants could and did acquire same from persons to be defrauded, at greatly reduced prices—"Now, both elements have got to be proven. You see, 'that did' is the element in that. The Government has got to prove that they did because they alleged that they did . . ." [R. 525]. Later the Court departed from this position and said the issue was, "Did they cause a '*situation*' to prevail where those securities sold for less than they would have sold had it not been for those actions, that is, sold generally in the market places of this city?" [R. 942-943].

The communications and conversations of Mr. Cronk with security holders of the First Security related to offers to buy; statements that the First Security was liquidating the assets of the Railway Mutual, that most of the assets had been liquidated and what remained was not the best that had been received, that if they did not sell their bonds they would have to wait several years (November 1, 1942) before they matured, that he was offering as

good a price as they could receive anywhere, that the offer was fair, and that he advised its acceptance [R. 451, 664, 679, 684, 701, 706, 722, 737, 745].

It was stipulated that all interest required to be paid by the First Security on its securities was paid [R. 799]. It was also stipulated that the securities, purchased from witnesses testifying respecting sale of their securities, had not yet matured at the time of sale [R. 681].

References to Liquidation Occurred Many Years After Exchange of Securities Had Taken Place.

We have noted heretofore that no representation whatsoever was made, that the First Security was organized for the purpose of liquidating the assets of the Railway Mutual to Security holders when exchange of Railway Mutual securities for those of the First Security took place [*supra*, p. 18]. No mention of liquidation occurs until 1937 in connection with the efforts of the Investment Finance Company to buy bonds of the First Security. On July, 1937, Mr. Cronk writes, "From the time of the organization of this company, it has proceeded with an orderly liquidation . . . In the natural course of events, it will be sometime subsequent to 1942 before this is accomplished . . . problematical whether the liquidation of the company should be further prolonged. Operating overhead cannot possibly be reduced as rapidly as the company income decreases . . . deemed advisable to contact . . . bondholders for the purpose of obtaining their recommendations with reference to future company policy . . . in near future, I will call upon you . . . or see you at this office" [R. 665]. On October 31, 1938, defendant Cronk wrote "The undersigned is

completing his work in connection with the liquidation of the First Security Deposit Corporation on November 25, 1938. Under the circumstances, this will be my last communication to you in connection with this matter" [R. 667-668]. The person to whom this communication was addressed did not sell her bond to either the Investment Finance or First Security. The bond matured and was paid in full on May 2, 1939 [R. 669].

On December 31st, the defendant Cronk wrote plaintiff's witness Morse, "You will recall that the First Security Corporation was organized to liquidate a large portion of the assets of the old Railway Mutual Building and Loan Association over a period of time . . . It is my understanding had this not been done, the situation would in all probability have been liquidated under a forced liquidation, etc., by the Building and Loan Commission." This witness did not sell his bonds, but held them until they matured in July 1939, when he received the full face value plus interest therefor [R. 691].

On July 27, 1938, the defendant Cronk wrote the plaintiff's witness Bidleman, "The First Security . . . was organized . . . to handle the liquidation of the assets of the old Railway Mutual . . . and it is my understanding had this not been done, the assets would have been liquidated by a receiver appointed by the building and loan commissioner at that time. This corporation is now in the final stages of this liquidation . . . these bonds are due in 1942, and under the trust indenture they have an additional . . . twenty-two months, which would be about the middle of 1944. In my opinion, the thing for you to decide is whether it would be to your advantage to cash these bonds . . . or wait that length

of time with the chance of realizing any more out of what is left of the assets after more than \$1,000,000.00 worth of assets have been liquidated" [R. 706].

On July 19, 1938, the American National Bank, on behalf of the witness Wright, wrote to the First Security that, "She had been informed First Security in process of liquidation and she has had an offer for her securities . . . advise us if . . . liquidating. . . . If she should sell . . . on the market at present time, can you tell us about what she should receive for them?" On August 3, 1938, the First Security replied, "This corporation is conducting a process of liquidation . . . ; the bulk of its assets consisting of trust deeds acquired during the inflation period of the late nineteen twenties, and of real estate acquired through foreclosure of such trust deeds. . . . Aim of the company to complete its liquidation. As to whether its security holders should retain, or dispose of, our securities, this company has no advice to offer . . ." [R. 869-870].

The Court treated the issue of liquidation as follows: "He (plaintiff) is entitled to show . . . that contrary to the representations made by these men to investors, instead of liquidating, they made investments in . . . various organizations, and it doesn't make any difference who controls it. The point . . . is not that they were making investments to themselves, directly or indirectly, but that they weren't liquidating, they were investing in oil wells or banks . . ." [R. 813].

Plaintiff's witness Drozda, testified that "The major part of my work was in liquidating the real estate that the company had acquired during the second period of employment with the First Security" [R. 399]. Drozda

was employed on this occasion from March 1933 until November 1934 [R. 404, 409, 399]. The policy of the company in this respect was reflected by Exhibit 94 [*supra*, p. 24, R. 320]. The Realty Deposit was a department of First Security engaged in disposing its real estate [*supra*, p. 23]. The Trust with the Metropolitan Trust was entirely liquidated by 1939. and was substantially liquidated prior to Cronk's employment [*supra*, p. 24].

There Was No Evidence of Any Conversion.

There was no evidence that any of the defendants benefited in the slightest by any of the investments or business transactions of the Investment Finance Company. As to the appellant Edgerton, there was no evidence that he was an owner of any stock in any of the concerns in which the Investment Finance Company owned stock or had invested any money; there was only evidence that he and the defendant Twombly had a stock interest in the Pierce Petroleum Company acquired long after the creation of any obligation between it and the Investment Finance. Ultimately, the Investment Finance was dissolved and all of its assets taken over by the First Security. The First Security and the Investment Finance had identical offices and maintained joint offices. The Investment Finance was the creature of the First Security and actually, for all practical purposes, was the subsidiary of the First Security.

The powers granted under the Reorganization Plan, Agreement, and Declaration of Trust were broad enough to permit these activities on the part of the First Security, *i.e.*, to organize the Investment Finance Company, loan it money and assets in exchange for cash and its own securities.

Collateral Transactions.

The plaintiff was permitted to show the organization and activities of a wholly collateral company known as R. F. D. Discount Company (name later changed to Consolidated Investment) over the objections that this evidence was in no wise connected with the scheme alleged in the Indictment [R. 248, 140, 142, 148, 410, 411, 414, 424, 475, 476, 480, 481, 505, 543-545, 552, 555, 556, 833, 909, 915]. This company was organized February 7, 1934 by the defendants Starr, Smale, Thomas, Ireland and Edgerton, and Messrs. Leffert, Johnson, Brayton, Anderson and Barry, all of whom with the exception of Mr. Edgerton were directors in the Railway Mutual and the First Security. Its purpose was to pool their various investments in securities of other corporations and their resources in one joint fund; and to pool their present voting strength of shares of stock held by them in the Railway Mutual and the First Security [R. 834, 839]. The corporation did not plan to do an active business of any kind [R. 835, 839]. They sought the issuance of stock of the company to be exchanged at par for Railway Mutual and First Security stock at par, for bonds issued by the First Security at par, and for services rendered to the corporation in an amount to be determined by the Board of Directors from time to time [R. 837-838].

Of the 75,000 shares of common, par value of \$1.00 a share, the appellant Edgerton received 131 shares for Collateral Trust Bonds of the First Security, 20 shares for one share preferred stock of the First Security, and 520 shares for services rendered to the corporation; or an aggregate of 671 dollars par value of R. F. D. shares.

The other nine individuals named were to receive in the main 7500 shares in exchange for various classes of bonds and preferred and common stock of the First Security Corporation [R. 847-849, 854]. Those not acquiring the full 7500 shares by an exchange could acquire the difference for cash [R. 847-850].

The stock of the R. F. D. Corporation was held, under the Corporation Commissioner's Permit, in escrow. The report of the escrow holder showed that as of July 20, 1934 stock was standing in the names of these various individuals in the aggregate amount of 33,566 shares, of which 993 shares were in the name of appellant Edgerton and his wife [R. 242, *et seq.*]; and, as of March 10, 1936 there were 575 shares in the name of the appellant Edgerton [R. 244].

The Investment Finance Company Board of Directors on November 9, 1939 passed a Resolution to purchase for \$36,000 the assets of the R. F. D. (Consolidated). These assets consisted of shares of common and preferred of the First Security and securities of the Railway Federal Savings and Loan Association [R. 547]. Thereafter, over a period of time from December 29, 1936 down to July, 1937, the Investment Finance paid in installments to the R. F. D. (Consolidated) said \$36,000.00. As the installments were received, the R. F. D. issued its checks to its various stockholders on a pro-rata basis, the distribution being "upon dissolution at rate of \$1.00 per share" [R. 143-156].

It was stipulated that these checks were received by the stockholders of the R. F. D. (Consolidated) in the aggregate amount of \$36,000.00, and were in turn re-trans-

ferred to the Investment Finance Company and deposited in the account of the Investment Finance Company [R. 143]. The appellant Edgerton received a check in the amount of \$1,666.00 from the R. F. D. (Consolidated) and endorsed the same over to the Investment Finance Company [R. 149]. When the payments of the \$36,000.00 were being made the R. F. D. (Consolidated) was in process of dissolution [R. 163].

The plaintiff's witness Bruce testified that the stock register of the Investment Finance Company reflected stock issued in the names of the several stockholders of the R. F. D. (Consolidated) in amounts of approximately the equivalent of the amounts of the checks transferred to Investment Finance and that the stock was issued shortly after such transfer of the checks [R. 567].

The Court, over objection, permitted evidence of a collateral transaction involving the R. F. D. relating to the refinancing by Reed Bros., Tapley, Geiger and Company of its loan. This company originally had negotiated a loan secured by trust deed for \$44,000.00 with the Railway Mutual which later was renewed by the Railway Mutual. This trust deed was acquired by the Metropolitan Trust under the order of segregation and division of assets of the Railway Mutual on December 29, 1933. At that time it was in default both in principal and interest payments for more than eight months. Mr. Reed had entered into an agreement with a third person to refinance this mortgage for the sum of \$22,000.00, which arrangement expired. Mr. Reed then made a similar offer to the R. F. D. through the appellant Edgerton. The R. F. D., in turn, made an offer to the First Security to pay \$17,800.00 in cash for the Reed loan, which was accepted.

The R. F. D. deposited bonds in an amount of ten per cent in excess of the face amount of \$44,000.00 of the Reed loan, with the Metropolitan Trust, whereupon the Reed loan was deposited in the escrow established by the Reed Company and the R. F. D., to be surrendered and cancelled upon the payment of \$17,800.00 in cash to the First Security and the balance to the R. F. D. The appellant Edgerton, in connection with his activities in this transaction, was paid \$1,000.00. Aside from this sum, he received for his services for a period of three years \$250.00 from the R. F. D. [R. 473, *et seq.*, 165].

Hearsay Accusatory Statements.

The Court permitted, over proper objections and exceptions, the plaintiff to introduce in evidence a statement made by the defendant Twombly to a post office inspector some time after he left the First Security and Investment Finance. This statement was admitted in evidence as to the state of mind and intent of the defendant Twombly. The statement is but a "screetch" by Twombly against the appellant Edgerton, exculpating himself and inculpating Edgerton. There was also admitted in evidence over proper objection and exception a portion of the report of the auditor H. D. Campbell, which expressed his personal conclusions and opinions concerning activities of the Investment Finance.

Also, there were numerous assignments of misconduct as to the actions and statements of both the trial court and counsel for the plaintiff.

In summary, the facts in evidence disclose:

1. The organization of the First Security (as a general mortgage and loan company) by the officers and directors of the Railway Mutual for the purpose of taking over a portion of the assets of the Railway Mutual.
2. The exchange by approximately 80% of the security holders of the Railway Mutual of their securities in that association for those of the First Security without any representations having been made as alleged in the indictment.
3. The retirement of all of the securities of the First Security and the liquidation of the trust with the Metropolitan Trust Company.
4. The liquidation of the assets received by the First Security from the Metropolitan Trust in exchange for its own securities at 10% in excess of the book value of the assets released.
5. The organization of the Investment Finance by the First Security and sundry investments by the Investment Finance; and the ultimate dissolution of Investment Finance and the acquisition of its assets by the First Security.
6. The acquisition both by the First Security and the Investment Finance of securities of the First Security below par, but not below market price.
7. The solicitation in 1937 and 1938 by the Investment Finance to purchase securities of the first security holders, during which time the Investment Finance made representations, which were true, that the First Security

had liquidated a substantial portion of the assets of the Railway Mutual and was liquidating the remainder thereof.

Upon this state of the record as to facts in evidence the plaintiff rested, and the defendants likewise did so.

The Questions Presented.

Upon this record, the basic contentions of the appellant Edgerton are as follows:

(a) That the trial court not only amended the indictment, but did so with respect to a vital and material allegation.

(b) That the evidence is insufficient to establish the scheme and artifice pleaded in the indictment.

(c) The trial court improperly submitted the issue as to whether defendants did depress and cause to be depressed the market value of securities.

(d) That the admission of the Twombly accusatory statement in evidence was erroneous and greatly prejudiced the rights of the appellant Edgerton.

(e) That the admission in evidence of the hearsay *ex parte* opinions and conclusions of H. D. Campbell was erroneous and greatly prejudiced the rights of the appellant Edgerton.

(f) That the misconduct of the trial court and counsel for plaintiff was greatly prejudicial to the rights of the appellant Edgerton.

(g) That the trial court improperly restricted the cross-examination of certain of plaintiff's witnesses on the issue of market price.

(h) That evidence of collateral transactions was erroneously admitted.

Assignments of Error Upon Which Appellant Edgerton Will Rely.

I.

Assignment XII [R. 1057-1060; Appendix p. 1].*

The trial court erred in overruling appellant's motion for an order arresting judgment on the grounds that (a) the purported verdict returned by the jury is not a verdict based upon the indictment returned by the Grand Jury, (b) the Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him, and (c) that he altered and amended the Indictment by striking therefrom the language contained therein "theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

II.

Assignment XIII [R. 1060-1062; Appendix p. 3].

The District Court erred in instructing the jury that the following words of the Indictment, "Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California" are deleted.

III.

Assignment I [R. 1051-1053; Appendix p. 5].

The District Court erred in denying the motion made by the appellant Edgerton at the close of the plaintiff's case and renewed at the close of all of the testimony in the case, to dismiss Count I of the Indictment.

*Wherever an assignment is printed in the appendix, we have at that point also included record references to the Bill of Exceptions showing the pages where the subject matter appears.

IV.

Assignments II, III, IV, V, VI, VII, VIII, IX, X, and XI [R. 1053-1057]; Bill of Exceptions [R. 944-946].

The District Court erred in denying the motions made by the appellant Edgerton at the close of the plaintiff's case and renewed at the close of all of the testimony in the case, to dismiss Counts II, IV, V, VI, VII, VIII, IX, XI, XII, XIII and XIV. Each of these Counts pleads the identical scheme and artifice to defraud pleaded in Count I, with the exception that a different indictment letter was pleaded in each count. The question of the insufficiency of the evidence as to each of these counts is the same as that relating to Count I which is the basis of Assignment I. The appellant was sentenced to a term of imprisonment on each of Counts I, IV, VI, VIII, XI and XIII, the sentence so imposed on each count was made to run concurrently with each other. On Counts II, V, VII, IX, XII and XIV, the Court placed the appellant on probation.

V.

Assignment XV [R. 1063]; Bill of Exceptions [R. 1038, 1041].

The District Court erred in refusing to charge the jury as requested by the appellant concerning the absence of evidence to prove market price, or prices, and the failure to prove the defendants "did depress or cause to be depressed, the market price."

VI.

Assignment XXIX [R. 1140-1172; Appendix p. 7].

The District Court erred in admitting into evidence over objections and exceptions of appellant, Plaintiff's Exhibit 216, and in denying his motion to strike said exhibit. This is the defendant Twombly's statement exculpating himself and inculpating the appellant Edgerton.

VII.

Assignment XXX [R. 1173]; Bill of Exceptions [R. 774-786-788, 944].

The District Court erred in denying the motion of the appellant Edgerton for a severance, made at the time of the offer of Plaintiff's Exhibit 216 in evidence and renewed at the conclusion of all of the evidence in the case.

VIII.

Assignment XXXI [R. 1173]; Bill of Exceptions [R. 788, 944].

The District Court erred in denying the motion of the appellant Edgerton for a mis-trial because of the introduction and receipt in evidence of Plaintiff's Exhibit 216.

IX.

Assignment XXV [R. 1091-1098; Appendix p. 34].

The District Court erred in admitting in evidence over the objections and exceptions of the appellant, Plaintiff's Exhibit 46, and in denying a motion to exclude the portion thereof containing hearsay *ex parte* comments, opinions, and conclusions of the author.

X.

Assignment XXVI [R. 1098, 1108; Appendix p. 41].

The District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of plaintiff during his closing argument to the jury and in his comments with respect thereto.

XI.

Assignment XXVII [R. 1108-1134; Appendix p. 49].

The District Court erred and was guilty of misconduct prejudicial to the appellant in requesting, suggesting, and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same.

XII.

Assignment XXVIII [R. 1134-1140; Appendix p. 71].

The District Court erred and was guilty of misconduct prejudicial to the appellant Edgerton before the jury.

XIII.

Assignment XX [R. 1068-1072; Appendix p. 76].

The District Court erred in permitting the plaintiff to argue to the jury during the course of its closing argument, and in so stating himself, that the defendants misrepresented to investors the manner in which their money would be invested, in the absence of any evidence of such a representation.

XIV.

Assignment XXIII and Assignment XXIV [R. 1083-1090; Appendix pp. 80, 84].

The District Court erred in sustaining objections of the plaintiff to certain questions propounded on cross-examination to plaintiff's witnesses Wright and Richmond concerning their respective activities in ascertaining the market price of the securities of the witness Wright and their knowledge as to the market price of those securities.

XV.

Assignments XXXIV to XXXIX, inclusive [R. 1176-1189; Appendix pp. 86-96].

The District Court erred in admitting evidence of collateral transactions.

ARGUMENT.

POINT I.

Assignment of Error XII.

The Trial Court Erred in Amending the Indictment by Deleting Therefrom a Portion of the Language Thereof Descriptive of the Type of Investments Which It Was Alleged Defendants Represented Would Be Made.

Assignment XII assigns error in the action of the District Court in overruling appellant's motion for an order arresting judgment on the grounds that:

- (a) The purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury,
- (b) The Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him,
- (c) The Court altered and amended the indictment by striking therefrom the language contained therein, "Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

The assignment relied on is printed in full in the appendix herein at page 1, *et seq.*

The ruling to which the said assignment relates appears in the Bill of Exceptions at page 1045 of the record.

The motion and proceedings to which said ruling relates appear in the Bill of Exceptions at pages 1043-1045 of the record.

The allegation of the indictment was:

"That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties *theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California*; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever." [R. 9.]

The foregoing paragraph constituted one of the two representations alleged in the indictment as false. The only other false representation alleged was one to the effect that First Security was organized to, and actively engaged in, the liquidation of the assets received from the Railway Mutual. No other misrepresentations were charged. The representation, before the deletion ordered by the Court, charged that loans would only be made on securities or properties approved as legal investments. After the deletion ordered by the Court, the representation was simply that investments would be made upon securities or properties.

The Court's instruction to the jury upon the submission of the case was as follows:

"You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit: 'theretofore approved as legal investments by the Superintendent of Banks

or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.' " [R. 1000.]

The Court further instructed the jury:

"I have already told you that I would strike out a certain portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:

' . . . theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California. . . . '

I shall refer to that later." [R. 991-992.]

Ever since the decision in *ex parte Bain*, 121 U. S. 1, the rule has been firmly settled in the Federal courts that no power exists in the trial court to alter, amend, delete, or add to an indictment presented by a grand jury, and that a conviction upon such an amended or altered indictment is void.

This Court, in the case of *Stewart v. U. S.* (C. C. A. 9), 12 Fed. 524, 525, had occasion to consider this precise question, and held that where an indictment for the

crime of smuggling charged that defendants did knowingly, willfully, unlawfully, and feloniously, etc., and with intent to defraud, etc., bring into the United States certain intoxicating liquors, it was fatal error for the trial court to strike out as surplusage the word "feloniously." This Court said:

"At the commencement of the trial, by consent of counsel for all parties, the court struck from the body of counts 2 and 3 of the indictment, as surplusage, the words 'feloniously and' in one place, and the words 'and feloniously' in another. This action on the part of the court is now assigned as error. The assignment is well taken. In *ex parte Bain*, 121 U. S. 1, 13, 7 S. Ct. 781, 787 (30 L. Ed. 849), the trial court struck six words from the indictment, as surplusage, and in discharging the petitioner on habeas corpus the Supreme Court said:

'It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed,

the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. . . . the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. . . . The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.'

In the course of the opinion there is some discussion of the question as to whether the grand jury would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute.

In Dodge v. United States, 258 F. 300, 169 C. C. A. 316, 7 A. L. R. 1510, certain words were likewise stricken from the indictment as surplusage, and, in holding that such action on the part of the court avoided the indictment, the Circuit Court of Appeals for the Second Circuit said:

'At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for defendant at once said: 'No objection.' The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country

and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.' . . .

So here the amendment of the indictment avoided the second and third counts, but did not affect the convictions under the remaining counts unless some other error intervened."

In the case of *ex parte Bain, supra*, 121 U. S. 1, 5, 9, the indictment charged a violation of the statute making it a crime to give any false report or statement of the banking association with intent to injure the association or any other company or individual or to deceive any officer of the association or any agent appointed to examine the affairs of such association. The indictment charged an intent to deceive the *comptroller of the currency* and the agent appointed to examine the affairs of said association and to injure, etc., etc., the United States, etc. Upon demurrer, the trial court had ordered the italicized words deleted. The conviction was set aside on *habeas corpus*, the Supreme Court holding that the indictment on which defendant was tried was not the indictment of the grand jury. There was nothing before the Court on which it could hear evidence or pronounce sentence.

The rule of the case of *ex parte Bain* has never been departed from and was reaffirmed by the Supreme Court in the case of *U. S. v. Norris*, 281 U. S. 619-622, 74 L. Ed. 1076, 1077, where the Court held that a stipulation of facts was ineffective to import an issue as to the sufficiency of the indictment or an issue as of fact upon the

question of guilt or innocence after plea of *nolle contendere*, the Court saying:

"If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 16 Am. Crim. Rep. 122. If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court."

It has been held that the district attorney, where an indictment is attacked as duplicitous, may not elect to rely upon one of the defenses charged and *nolle pros.* the others, as this would in effect constitute an amendment of the indictment. *U. S. v. Dembowski*, D. C. Mich., 252 Fed. 894-898:

"It seems clear that, if the District Attorney is permitted to *nolle pros.* a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the jury. . . . To amend is to 'free from error'; to 'remove what is erroneous, superfluous, faulty, and the like.' 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 *et seq.*, and in vol. 1, Second Series, at p. 199 *et seq.*, numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof."

In *Naftzger v. U. S.* (C. C. A. 8), 200 Fed. 494, 496-497, it was held that although it was unnecessary that the indictment for receiving stolen stamps should have specified that they were stolen from "certain post offices in the State of Kansas," nevertheless the indictment having so specified, the descriptive words could not be stricken as surplusage. The Court said:

"Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but, having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of the grand jury only—a co-ordinate branch of the court."

After referring to *ex parte Bain* the Court said:

"It was conceded that there was no necessity to allege that the Comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from wheresoever stolen from the Government. But it is alleged that the stamps were stolen within the state of Kansas.

An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner."

In all the foregoing cases the matters deleted were not in themselves substantial or material, except that the grand jury, in framing the indictment in those particular terms, had constituted such terms material.

In the present case, the portions deleted constitute a very material and vital portion of one of the two misrepresentations charged. The indictment, as found by the grand jury, charged that the representation was made that the funds would be invested in securities and properties approved as legal investments. As amended by the Court, the representation was merely that the money would be invested in securities or properties—without any reference to whether the securities or property were to be approved as legal investments. The prosecution wholly failed to prove that any representation whatever had been made that the money would be loaned or advanced only upon securities so approved. (Point III, *infra*, p. 67.) It was to meet this defect in proof that the Court deleted that portion of the representation as found by the grand jury and permitted the jury to convict upon the finding of a different and lesser representation.

While, under the rule of *ex parte Bain* and cases cited, it is not necessary that an amendment be as to a material or substantial matter in order to invoke the rule which renders the trial court powerless to amend the indictment as found by the grand jury, it is obvious in the present case that the amendment was in a substantial and material particular.

This Court, in *Barnard v. U. S.* (C. C. A. 9), 16 Fed. (2d) 451, 453, has pointed out that:

“The very essence of the crime consists in the making of false promises which the parties never in-

tended to perform, or false representations which they never intended to make good."

Therefore, in amending the promise or representation as charged by the jury, the trial court amended the indictment in a matter going to the very essence of the crime. As is hereafter pointed out, in authorizing and instructing the jury to convict upon proof of a representation falling short of that charged in the indictment, the Court violated the elemental rule of substantive law that falsity of a particular representation as an entirety must be shown.

Even in a civil case it is held that proof of the making of only a portion of the representation charged is such a substantial variance as to defeat recovery. The representation must be proved in its entirety. Proof of only a portion of the representation is as ineffective as a total failure of proof.

27 *Corpus Juris*, p. 42, sec. 166.

See also:

Sacramento Suburban etc. Co. v. Stern (C. C. A. 9), 36 Fed. (2d) 928, 929. (*Infra*, p. 68.)

The damaging effect of the trial court's order striking that portion of the representation relative to the character of the securities is at once apparent, for the trial court had permitted evidence as to a variety of investments over a long period of time which were entirely immaterial to any issue except the issue presented by the charge that money would be advanced only upon approved legal investments, and this was the ground upon which the trial

court admitted this evidence of numerous collateral transactions and he so instructed the jury.

“The Court: The amount of the investment is material. Beyond that I am not interested, and there being no showing that the directors here were involved in it, it is simply under the one matter alleged in the indictment, namely, that this corporation invested in other than securities which were indicated in its representation.”

“Mr. Lawson: As I understand Your Honor, it is limited to that part of the indictment that says that they represented that the investments would be legal investments.

The Court: That is the reason it is being permitted to go in evidence.” [R. 857-858.]

And at the conclusion of the trial:

“The Court: Well, the reason which I have announced, gentlemen of the jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in effect, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the plaintiff's case in connection with that allegation of the indictment.” [R. 861.]

After the evidence had been closed, during the argument on motion for directed verdict in the absence of the jury, the Court emphasized that there was no evidence in the record that any false representation was made that the loans would be made on approved legal investments.

At this stage of the case, the Court stated with reference to the showing as to a misrepresentation that the loans would be secured by approved legal investments:

"The Court: Suppose they made the representation: There is no proof in the record that they were false. So whether they made the representations or not might not be material, as there is no proof that that was not true.

Mr. Lawson: Then it must be admitted that there was no such representation, that is, of a false character made with reference to that subject matter.

The Court: It must be proved. Under the present state of the record, there is no proof that that representation was false. * * * So, therefore, there is no evidence in this record as to the falsity of those representations." [R. 936, 937.]

Manifestly, it was to fit this defect in proof that the indictment was amended to omit the charge that the representation was that the money would be loaned or advanced only on approved legal investments. The Court's amendment was made after all the proof was in and during the course of his formal instructions to the jury.

After so amending the indictment, the trial court instructed the jury that proof of any one of the two false representations would authorize a verdict of guilty. The Court authorized a verdict of guilty upon a finding that defendants devised or intended to devise a scheme to defraud "by means of at least one of the false representations, pretenses, or promises * * *" [R. 999.]

POINT II.

Assignment of Error XIII.

The District Court Erred in Instructing the Jury That Certain Portions of the Indictment Were Stricken and Were to Be Disregarded and the Indictment Should Be Read as Though Said Words Had Been Stricken.

Said Assignment of Error is printed in full in the appendix at page 3 and succeeding pages.

The instruction to which said assignment relates appears in the Bill of Exceptions at page 1000 of the record. The exception to said instruction appears at pages 1038-1040.

The character of the amendment made by the Court by deletion is shown in the preceding point and the argument there advanced is applicable to the ruling to which this exception relates and is adopted as the argument addressed to this Assignment of Error.

POINT III.

Assignment of Error I.

The District Court Erred in Denying the Motion Made by the Appellant Edgerton at the Close of the Plaintiff's Case and Renewed at the Close of All the Testimony in the Case, to Dismiss Count 1 of the Indictment.

Said Assignment of Error appears in full in the appendix hereto at page 5 and succeeding pages.

The motion referred to in the foregoing assignment and the ruling of the Court thereon appear in the Bill of Exceptions at pages 927, 944, 945, and 946 of the record.

The appellant was convicted only on counts of the indictment charging substantive offenses. All of these counts are identical with the exception of the Indictment letters. The grounds upon which Count I is challenged as to insufficiency of the evidence are the same grounds upon which the remaining counts are challenged.

We shall present the argument relating to this assignment under the following topics:

(a) There is no evidence to sustain the allegation that it was falsely represented that the First Security did loan money only upon security on properties approved as legal investments.

(b) That there is no evidence to sustain the allegations that it was falsely represented or pretended that the First Security was organized for the purpose of, and actively engaged in, the liquidation of the assets received by it from the Railway Mutual.

(c) That there is no evidence to sustain the allegation that the defendants did depress and cause to be depressed the market price of the securities of the First Security.

(d) That there is no evidence to sustain the allegation that defendants did convert and divert to their own use, benefit, and profit, large sums of money and property of the First Security, under the pretense of loans; or for that matter, by any other means or method.

(a) **There Is No Evidence to Sustain the Allegation That It Was Falsely Represented That the First Security Would Loan Money Only Upon Securities on Properties Approved as Legal Investments.**

This is one of the two false representations pleaded in the indictment and the one which the Court amended.

We have shown that the Plan, Agreement and Declaration of Trust for the reorganization of the Railway Mutual had been conceived, the securities exchanged, and the Plan declared effective approximately two years prior to the time Mr. Paul Nourse, for whom the appellant Edgerton worked, became attorney for the First Security; and that there was not a scintilla of evidence that any representation was ever made to anyone that the First Security would advance and loan money only upon securities and properties approved as legal investments. We have also shown there is a total lack of evidence that the appellant Edgerton had any knowledge that the Plan contained any such statement of the business purpose of the First Security (*supra*, pp. 8-21).

The only evidence concerning any representation as to the purpose of the First Security was that it was organized to operate as a mortgage company in order that it could function with the general advantages of a mortgage company under the law unburdened with the legal restrictions of a building and loan association. These representations are not charged in the indictment as being false. Again, there isn't the slightest evidence that the appellant Edgerton ever had any knowledge of such representations (*supra*, pp. 14-16).

The trial court at the conclusion of all of the testimony in the case stated that there was no proof that the defend-

ants *falsely* represented that the First Security would only advance or loan money on securities or properties approved as legal investments [R. 936-937].

To cover this defect in proof the trial court authorized the jury to convict even though there was no proof of the falsity of this element of the representations (*supra*, Point I, pp. 54, 64).

Fraud must be specially pleaded. An actionable misrepresentation consists of a false statement of a material fact (in a criminal case the proof must also show that the statement is knowingly false). Plaintiff must prove the making of the particular false statement alleged, otherwise a variance results.

In Sacramento Suburban, etc., Co. v. Sterm (C. C. A. 9), 36 Fed. (2d) 928, 929, this court said:

"The alleged fraud consisted of misrepresenting the value of the land, relied upon by the appellee, and the representation that the land was 'rich and fertile, capable of producing all sorts of farm crops and products, and that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit trees, and that the said land was perfectly adapted to the raising of fruits of all kinds.'

The appellant requested an instruction, No. 14, to the effect that the plaintiff could only recover upon the proof of the false representations alleged in the complaint and not for other false representations. This was a proper instruction, and the court, after stating the alleged fraud in the terms of a complaint, instructed the jury in effect that, if it was shown that the land was not capable of raising fruit in commercial quantities as represented in the appell-

lant's book, plaintiff could recover. For illustration, the court instructed the jury as follows:

'So, gentlemen of the jury, taking the plaintiffs' evidence, and the defendant's evidence, in respect to the adaptability of the land for commercial orcharding, if you find by the greater weight of the evidence that this land is not adapted to commercial orcharding, and is not worth \$350. an acre, then you proceed to the next step.' Judgment reversed."

To the same effect is:

Brandom v. McCausland (C. C. A. 8), 171 Fed. 402, 404;

27 Corp. Jur., pp. 40, 41, Section 165. (See *supra*, p. 61.)

The holding of the court in *City Loan and Banking Co. v. Byers* (Ala.), 55 So. 951, 952, is directly in point here.

"The allegation of the falsity of the one alleged representation as an entirety is descriptive of the total complained of, and is not sustained by proof of the falsity of only a part of such representation. (Citing cases.) No evidence was offered tending to prove the falsity of the part of the representation alleged to the effect that the defendant had given no security for any one, or of the part of such representation to the effect that the defendant had not made any assignment of his wages or salary. These were material parts of the representation upon the truth of which the plaintiff claims that it relied in making the loan to the defendant. In this state of events, the plaintiff was not entitled to recover, because of its failure to prove material averments of its complaint."

(b) There Is No Evidence to Sustain the Allegations That It Was Falsely Represented or Pretended That the First Security Was Organized for the Purpose of, and Actively Engaged in, the Liquidation of the Assets Received by It From the Railway Mutual.

This is the second, and only other, false representation pleaded in the indictment.

We have shown that there is no evidence whatever that investors in the Railway Mutual exchanged their securities for those of the First Security upon any representation that the First Security was organized for the purpose of liquidating the assets of the Railway Mutual (*supra*, pp. 15, 18, 37).

It is important to note the exact language of the continuing false representation, *i. e.*, "that the First Security was organized for the purpose of and was duly and actively engaged in the liquidation of" the assets "received by it *from* the Railway Mutual." The First Security received its assets from the Metropolitan Trust Company upon the surrender of its own obligations for cancellation in an amount of 10% in excess of the book value of assets received. We have shown that the trust was entirely liquidated and that, as a matter of fact, the First Security was duly and actively engaged in the disposition of physical assets so received by it from the Metropolitan Trust contemporaneously with the distribution of the physical assets of the Railway Mutual to the Metropolitan Trust in 1934 and from thence forth (*supra*, pp. 20-24, 40).

As we have seen, nothing was represented to anyone with respect to the First Security being organized for the purpose of liquidating the assets of the Railway Mutual until approximately six years after the Plan, Agree-

ment and Declaration of Trust had been executed. These representations were contemporaneous with the employment of Mr. Cronk in July of 1937, after most of the obligations of the First Security had been retired and most of the trust had been liquidated. Such representations *only* were made in connection with inducing holders of securities of the First Security to sell the same to the Investment Finance. What evidence there was on the subject of market price showed that these securities were acquired by the Investment Finance at not less than market price (*supra*, pp. 36-38).

The plaintiff utterly failed to show that any of the securities so acquired by the Investment Finance during the period that this representation was currently made ever acquired any securities from any security holder at less than market price. In no way does the evidence show that this representation, false or true, in any wise resulted in any security holder being defrauded. Further, that part of the representation currently made during Mr. Cronk's employment by the Investment Finance that the First Security was liquidating the assets of the Railway Mutual was not shown to be false. On the contrary, the evidence we have seen shows that from 1934 on the First Security obtained physical assets from the Metropolitan Trust upon surrender of these very securities for cancellation; and, thereafter, the liquidation of said assets (*supra*, pp. 36-41).

These representations occurring as they did some six years following the execution of the Plan, Agreement and Declaration of Trust, and the exchange of the Railway Mutual securities for those of the First Security, even if we assume them to be false, does not present sub-

stantial proof of the scheme and artifice pleaded. The proof must fairly establish substantially the scheme and artifice pleaded. The scheme and artifice pleaded had its inception in the exchange of the securities of the Railway for those of the First Security.

See cases, subhead (a), *supra*, pages 68-69.

In *Haas v. United States* (C. C. A. 8), 93 Fed. (2d) 427, 434-435, under an indictment charging defendant directors with a scheme to defraud, by obtaining, by false pretenses, a secret profit from the Foresters in connection with the merger of two fraternal benefit societies, proof that defendants were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from one Parks, a broker, was held to constitute a fatal variance.

The Court said:

“Whether the breach of trust of which the defendants who were clearly guilty in Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for themselves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, 18 U. S. C. A. 338, provided the mails were used in executing or attempting to execute the scheme, it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment.

In *Brown v. United States*, 8 Cir., 146 F. 219, on page 220, this court said:

'The purpose of requiring a description of the scheme to defraud in the indictment is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense.' *Brooks v. United States* (C. C. A.), 146 F. 223, decided at this term, and not yet officially reported; *Stewart v. United States*, 119 F. 89, 94, 55 C. C. A. 641; *United States v. Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516.

'It follows that one must be convicted, if at all, on the scheme as alleged and if the scheme as alleged is not substantially established by the proof he cannot be convicted.'

See also, *Gammon v. United States*, 8 Cir., 12 F. 2d 226, 228, and *Rude v. United States*, 10 Cir. 74 F. 2d 673, 677."

In *Brown v. United States* (C. C. A. 8), 146 Fed. 219, 220, 222, the scheme charged was to obtain money for the purchase of commodities on some board of trade, defendant to operate as broker, defendant not intending to make actual purchases. The transactions proved were sales of options from defendant to a customer and not a purchase made on a board of trade for him.

This was held to be a fatal variance.

In *Smith v. United States* (C. C. A. 8), 83 Fed. (2d) 631, 640, the indictment charged that defendant assisted and rendered assistance to a veteran in the preparation and execution of the necessary papers in the presentation to the United States Veteran's Administration of a disability claim and unlawfully charged an excessive fee for such assistance (p. 639). The proof showed the preparation

and filing of a mandamus action in the District of Columbia against the Veteran's Administration.

After pointing out that the pleader had "thus set out a description of the specific means by which the offense was consummated," the Court held that a fatal variance resulted, saying:

"That action in mandamus, however futile from a legal standpoint, does not come within the terms of the indictment charge.

'* * * Where, however, it is necessary or where the pleader elects to set forth by averments in the indictment or information, a description of the instrument or the means by which the offense was consummated, then the evidence must correspond with the averments in general character and operation.' 1 Wharton's Criminal Evidence (10th Ed.), par. 91, p. 277."

In *Gammon v. United States* (C. C. A. 7), 12 Fed. (2d) 226, an indictment charging use of mails in execution of scheme to defraud by obtaining orders which would not be filled was held not supported by proof of soliciting orders knowing business to be insolvent, with the hope of being able to bolster it up.

See additional cases, *supra*, pages 60, 68.

(c) There Is No Evidence to Sustain the Allegation That the Defendants Did Depress and Cause to be Depressed the Market Price of the Securities of the First Security.

This allegation contains two elements: one, that the defendants "did depress and cause to be depressed the market price," and two, that "defendants might and did acquire the same * * * at prices greatly reduced." The Court, during the trial of the case, unequivocally

took the position that both of these elements must be proved under the indictment [R. 525, 527].

The Court, following the conclusion of the taking of testimony and during the course of his instructions, departed from this position and failed to give the instruction requested by the appellant in this regard. The Court instructed the jury that they were warranted in finding that the defendants "depressed and caused to be depressed the market price of the securities * * * as alleged in the indictment" if they found "that *a situation* was caused whereby the persons * * * intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants."

Thus, the Court submitted this issue to the jury on the basis of bad business management and left it to the jury to speculate as to whether a higher price could have been obtained than was, in the absence of any proof as to market price or market value.

We have shown that the plaintiff made no attempt to prove either market price or market value of these securities; also, that where it was permitted to be elicited on cross-examination the security holder received not less than the market price in the sale of his securities (*supra*, pp. 36-37).

As we have seen, there were no false representations in inducing the exchange of the securities. Therefore, there remains only the issue of acquisition of securities at greatly reduced prices by false representations resulting in depressing the market price thereof. The fraud on this second branch of the case consists of buying the securities from investors under the market price. If they were

paid the market price, they have not been defrauded even though false representations were made to induce the sale.

It is important to note that the alleged false representation as to liquidation of the assets of the Railway Mutual was withdrawn by the above instruction of the Court from consideration by the jury in connection with this allegation that the defendants did depress the market price and acquired the securities at reduced prices. See our comment *supra*, page 6; also *Barnard v. U. S.*, *supra*, page 61.

In *Mandelbaum v. Goodyear Tire and Rubber Co., et al.* (C. C. A. 8), 6 Fed. (2d) 818, 825, it was held that plaintiff in an action for fraud and deceit must prove that the property at the time of sale was worth less than the price paid, and how much less.

Affirming judgment for defendants, the Court said:

“It is then incumbent upon him to prove that the property at the time of the sale was worth less than the price paid, and how much less. *Sigafus v. Porter*, 179 U. S. 116, 21 S. Ct. 34, 45, L. Ed. 113; *Nupen v. Pearce*, 235 F. 497, 149 C. C. A. 43; *Richardson v. Lowe et al.*, 149 F. 625, 79 C. C. A. 317.”

It is a matter of common knowledge, as the decisions reflect, that during the period covered by the indictment the country generally was passing through a period of depression in which many economic forces operated to depress market value of securities generally and especially of real property securities. The fluctuations thus occasioned were entirely independent of the actual in-

trinsic value of the stock or securities. In *Mandelbaum v. Goodyear Tire & Rubber Co., supra*, 6 Fed. (2d) 818, 824, the Court said:

“It is a matter of common knowledge that a period of depression, such as has been shown to exist, coupled with the necessity of refinancing and re-organizing, would of itself depress the price of any stock upon the market without regard to its actual intrinsic value * * *”

In *Gold v. United States* (C. C. A. 8), 36 Fed. (2d) 16, 33, it was held that in view of the abnormal business conditions it was improper to admit evidence of a drop in price of a certain bank stock between 1925 and 1927, for the purpose of showing the 1925 prices were fictitious. The Court said:

“Evidence of various kinds was allowed to be introduced tending to show a drop in the price of the stock of the Southern Minnesota Bank from May, 1925, to the time of the trial in November, 1927; the purpose of the evidence being to establish that the prices in May and June, 1925, were fictitious and caused by the alleged fraudulent representations. The evidence was plainly inadmissible. Many factors might have intervened to affect the price unfavorably, and the uncontradicted evidence in the case showed the existence of a number of such unfavorable factors after the sales in May and June, 1925. The ruling in the Mandelbaum case on a similar point is controlling here.”

In *Castle v. Acme Ice Cream Co.*, 101 Cal. App. 94, 101, the Court said:

“There is no presumption that the face value of stock is its real value.”

In *United States v. Schwartz* (D. C., Cal.), 230 Fed. 537, 538, a demurrer to an indictment was sustained for failure to show the real value of the lots which were being sold under the alleged fraudulent scheme.

The Court stated at page 538:

“It is immaterial that a purchaser may not get a lot worth \$150 for \$19.50, although expecting to do so. If he does get a lot worth much more than \$19.50 for that sum, he cannot be said to have been defrauded, and there is nothing in the indictment to negative this possibility.”

To the same effect:

Miller v. United States (C. C. A. 7), 174 Fed. 35, 38.

In passing upon the motion of defendant Twombly for a bill of particulars, the trial court followed the rule of the foregoing cases. In his instructions he told the jury that he had ruled that defendant Twombly was entitled to know “the *actual value* of the securities depressed, the amounts withheld * * * [R. 987].

No proof having been offered as to the actual value of such securities, or of any disparity between actual value and market value or even any evidence as to prevailing market price—and no suggestion of manipulating the market price downward—the trial court authorized the jury to conjecture whether a “situation was caused” whereby the sellers were not able to get “as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants” [R. 1033]. (See Point V, *infra*, p. 83.)

The indictment presents the specific charge that defendants *depressed the market price*. There was a total absence of proof of any of the elements of this charge. There was no proof of market price, no proof of actual value and no proof of depressing the market price.

In substituting an entirely different issue and authorizing the jury to convict upon their own view of whether the defendants' activities generally were such that the sellers received less than they otherwise would, the Court bridged a defect in proof more serious than that condemned in any of the cases cited (*supra*, pp. 60, 68, 72).

(d) There Is No Evidence to Sustain the Allegation That Defendants Did Convert and Divert to Their Own Use, Benefit, and Profit Large Sums of Money and Property of the First Security, Under the Pretense of Loans; or for That Matter, by Any Other Means or Method.

There was no evidence that defendants converted and diverted to their own use, benefit, or profit, large sums of money or property of the First Security, or of the persons allegedly intended to be defrauded, under the pretense of loans, or otherwise.

It was conceded by the plaintiff that the defendants did not convert and divert personally to their own use any of the property or funds of the First Security. The plaintiff, however, did contend that the First Security loaned and advanced money to the Investment Finance Company and that the Investment Finance Company, in turn, loaned

moneys to two other corporations, namely, the Pierce Petroleum Corporation and the Pacific Brick Company, in which one or more of the defendants had a stock interest. We have seen that the only company in which the appellant Edgerton had a stock interest was that of the Pierce Petroleum, and this stock interest appears approximately two years after the Investment Finance loaned moneys to the Pierce Petroleum. In fact, none of the defendants had any interest in the Pierce Petroleum at the time the loans were made. It likewise appears that Mr. Twombly had a stock interest in this same company under like conditions as those of appellant Edgerton. The appellant Edgerton had no stock interest in any of the other companies to whom the Investment Finance loaned money (*supra*, pp. 28-32). As we have seen, only the defendants Starr and Thomas had a very casual minor stock interest in the Pacific Brick Company (*supra*, p. 30). There is no proof that they profited in the slightest from any moneys loaned to the Pacific Brick Company.

We have also seen that the First Security organized the Investment Finance and was the sole stockholder of that company, with the exception of qualifying shares in the board of directors, at a time when the Investment Finance Company initiated the making of loans and purchase of stocks in other corporations; also, that these loans and borrowing had reached their high point at the time the defendants became stockholders of the Investment Finance by the transfer of the assets of the R. F. D. to the Investment Finance (*supra*, pp. 26-28). Further, we

have seen that this line of investments and loans by the Investment Finance was established long before the appellant Edgerton became manager of the Investment Finance (*supra*, pp. 29-32).

The stock interest acquired by Mr. Edgerton in the Investment Finance amounted to \$1,666.00. Most of the other defendants' stock interest amounted to \$7,500.00.

The evidence also discloses that most of the other defendants were executive officers in the Railway Mutual, initiated the plan of reorganization, and officered the First Security, long before Mr. Edgerton became identified as the attorney of that company; and they continued in their respective official capacities after he became attorney.

All of these defendants, with the exception of the defendant Twombly, were either acquitted on all counts, acquitted on some, or a disagreement was had on the counts upon which they were not acquitted [Supplemental Record p. 1 *et seq.*]. Obviously, there were factors which worked powerfully against the appellant Edgerton, *e.g.*, collateral matters such as the Twombly statement, and rulings, acts and statement of the Court which deprived him of a fair trial.

POINT IV.

Assignments of Error II to XI, Inclusive.

These Assignments of Error Relate to the Insufficiency of the Evidence as to Each Count Upon Which the Appellant Edgerton Was Convicted and Challenge the Ruling of the Court in Denying His Motion Made at the Close of the Plaintiff's Case and Renewed at the Close of All the Testimony in the Case to Dismiss Said Counts.

Said assignments of error are identical with Assignment of Error I which is printed in full in the appendix hereto at page 5 and succeeding pages.

The motion referred to in the foregoing assignments and the ruling of the Court thereon appear in the Bill of Exceptions at pages 927, 944-946 of the record.

These counts are all identical with Count 1 of the indictment except for different indictment letters, and all charge the same substantive offense.

Assignments of Error I, III, V, VII, VIII and X relate to the Court's error in denying the motion to dismiss Counts 1, 4, 6, 8, 11 and 13 of the indictment; upon these counts, the Court imposed sentences of imprisonment, said sentences to run concurrently with each other. Assignments II, IV, VI, VII, IX and XI relate to Counts 2, 5, 7, 9, 12 and 14 of the indictment. On these counts, the Court placed the appellant on probation.

The arguments advanced in the preceding point and the succeeding point are applicable to these assignments of error and are adopted as the argument addressed to them.

POINT V.

Assignment of Error XV.

The District Court Erred in Refusing to Charge the Jury as Requested Concerning the Absence of Evidence to Prove Market Price or That the Market Price Had Been Depressed.

Assignment of Error XV is as follows:

“Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 88,

(Defendant J. Howard Edgerton's Requested Instruction No. 88)

‘You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities.’

An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction.” [R. 1063-1064; Bill of Exceptions R. 1038, 1041.]

In lieu of the foregoing instruction, the trial court instructed the jury,—

“If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were

not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants, other than the defendant Twombly, then you are at liberty to find that the defendants depressed and caused to be depressed the market price of the securities of the First Security Deposit Corporation as alleged in the indictment." [R. 1033.]

As we have seen in Point III, *supra*, page 74, the allegation of the indictment was that defendants "did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation, so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof . . ." [R. 8.]

The prosecution wholly failed to prove that the market price of the securities had been depressed as alleged, Point III, page 74, *supra*. Nor was there any proof of the market or intrinsic value of the securities or stock, or of any fluctuation therein.

This obvious defect in proof upon a material charge of the indictment was supplied by the trial court's action in rejecting the defendant's instruction and instructing as he did.

The Court authorized the jury to consider whether a "situation was caused," whereby the sellers received less than they would have received, "except for the activities" The fact that a "situation was caused," knowingly or unknowingly, or by reason of bad judgment or otherwise, which reacted unfavorably upon the resale price of the securities, made the defendants guilty of depressing the market price.

The phrase "a situation was caused" is itself so indefinite, vague and all-comprehensive as to constitute the jurors the judges of both the law and the facts, in effect it required the jury to exercise a "roving commission" to determine on its own opinion of the law and the facts whether the various transactions in evidence were calculated to react unfavorably on the price obtainable by the sellers.

Barrett v. So. Pac. Co., 207 Cal. 154, 165.

The general conduct of business in a manner resulting ultimately in lessening the sales price of stock, was made the criterion of criminal liability, rather than the specific charge of the indictment that defendants had depressed or caused to be depressed the market price of the securities. There is no particular instance of mismanagement or even bad judgment which the jury might not infer would react unfavorably upon the sales price of the securities under the Court's instruction. Even though appellant had not requested a proper instruction, the instruction that the Court did give is so patently erroneous as to invoke this Court's jurisdiction to consider the same as a plain error even in the absence of an exception thereto.

In the case of *United States v. Minuse*, C. C. A. 2, 114 Fed. (2d) 36, 39, *infra*, page 138, defendants were charged with manipulation of security prices in violation of the Securities Exchange Act. The proof showed considerable fluctuation in the market price, likewise a large number of "wash sales," also matching of purchases and sales and use of dummies to buy or sell stock. The judgment of conviction was reversed for insufficient proof of

intentionally manipulating the market price, the Court stating:

“To convict defendants it was necessary to prove that they *intended* to manipulate the stock market.”

So, in the present case, the fact that as a result of defendants' management of the affairs of the companies involved, the price obtainable for the securities may have been less than the price would have been, if defendants had taken a different course of action, is not sufficient to support a charge of depressing the market price. Defendants were not on trial for all business errors which might react on the securities' price. They could only be convicted under the charge, if it was shown not only that the market price was depressed, but that the defendants *intentionally* depressed it.

The Court's instruction withdrew the element of market price as such, or any fluctuation of the market price. It left for the consideration of the jury, only the question of whether in their opinion a higher price would have been obtainable except for defendants' activities.

The error of the Court in this regard was especially prejudicial in view of the entire failure of proof of market price or fluctuation in market price of the securities, *supra*, Point III, page 74, and in view of the trial court's rulings refusing to allow evidence as to the market price, on cross-examination of plaintiff's witnesses. *Infra*, Point XIV, page 151.

The prejudicial effect of the trial court's instruction is all the more glaring by reason of the fact that it constituted a complete reversal of the position consistently taken by the Court during the trial of the case.

Thus, Record pages 524-525, after counsel for defendant had stated that there was no evidence that the market had been depressed, and further

“. . . the mere fact that the bonds had a face value of \$100 and might have been bought for \$40.00, itself does not tend to prove or disprove any of the issues set forth in that conjunctive allegation (referring to the charge in the indictment).

The Court: That was the thing that I wanted to bring specifically out into the record because of the wording of this indictment and the wording of the question.

It seems to me *there are two necessary phases of proof* in that paragraph in the indictment. . . .

The first element, ‘that the defendants would depress and cause to be depressed the market price of the said securities.’ That is the first element.

The second element is they did that ‘so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value.’

Now, both elements have got to be proven.”

Further, with reference to the first allegation, the Court stated:

“The Court: That is an important allegation in the indictment, and proof will have to be coming in to connect those two together in order for the government to make its case, and then if they don’t, you can move to strike.”

Attention has already been called to the Court’s ruling requiring the prosecution to show in a bill of particulars the *actual value* of the securities depressed (*supra*, p. 78).

POINT VI.

Assignment of Error XXIX.

The District Court Erred in Admitting in Evidence the Statement of Defendant Twombly, After His Disassociation From the Defendants, Exculpating Himself and Inculpating the Appellant Edgerton.

The assignment of error to which the discussion under this topic will be directed, relates to the admission in evidence of Plaintiff's Exhibit 216, over the objections and exceptions of the appellant, and in denying his motion to strike the same. This is a statement made by the defendant Twombly to a post office inspector some time after he disassociated himself from the defendants, and after he had left the employ of the First Security and Investment Finance. The statement is one which exculpates himself and inculpates the appellant Edgerton. It is a long accusatory statement against Mr. Edgerton, of which he had no information until it was offered at the trial.

Said assignment of error appears in full in the appendix hereto, at page 7, and succeeding pages.

The ruling to which said assignment relates, appears in the Bill of Exceptions at pages 791, 794, and 920 of the record.

The objections and proceedings to which such ruling relates, appears in the Bill of Exceptions at pages 753, 775-791, and 919 of the record.

Plaintiff's Exhibit 216 was a lengthy statement, undated, which plaintiff's witness Webster testified that Mr. Twombly had told him in July of 1940 he had prepared and handed to Inspector Van Meter in 1939 [R. 773-4]. There was no evidence as to the time when the statement

had been prepared, and no evidence whatever that the statement had been exhibited to anyone except Inspector Van Meter in 1939, and to Mr. Webster in July of 1940 [R. 751].

Mr. Twombly was General Manager of the First Security from 1934 to 1938 and of the Investment Finance Company from 1935 to 1938, when he severed his connection with the Company. The Court instructed the jury that Mr. Twombly "severed his connection with all of the corporations on December 21, 1938, and the plaintiff doesn't claim that he is chargeable with any criminal action that happened subsequent to that date." [R. 1027, 981.]

Without further identification as to date or circumstance under which the statement was made, the Court permitted the statement to be read in evidence to the jury as the Court stated in his formal instructions to the jury, "for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved." [R. 1031.] (The Court in his final instructions required the jury to consider this statement for additional purposes, *infra*, p. 97.)

The Court recognized the necessary prejudicial effect of this evidence upon the other defendants involved, and stated [R. 785-6]:

"The Court: Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall, * * * in getting at the intent, when he was connected with these companies * * * Does it make a particle of difference whether he got it from the books, whether he got it from

Kenner, whether he got it from Mr. Edgerton, or whether he didn't get it from anybody, whether he had a dream and he got it out of a dream. Is it not admissible to show what he thought, whether it was true or false?" [R. 785-6.]

Defendant Edgerton objected to the reception of said evidence, and thereafter moved to strike the same upon the grounds that no sufficient foundation was shown, that the statement was hearsay, immaterial, was made after the termination of Twombly's connection with the defendants and after the termination of the alleged conspiracy, that it was not binding upon defendant Edgerton or within the issues of the case; that it was a recital of conclusions and a narration of past events not material or competent for any purpose, and of such a prejudicial character that its reception in evidence could not be cured by any limitations which the Court might assume to place thereon; that its effect was to impose the burden of proof upon defendant Edgerton to prove his innocence [R 753, 775-791, 919].

THE ACCUSATORY STATEMENTS EMBODIED IN THE
TWOMBLY STATEMENT WERE HIGHLY PREJUDICIAL
TO APPELLANT EDGERTON.

It is well to note that Post Office Inspector Webster started the government's investigation after receiving the statement that Twombly had prepared and handed to Inspector Van Meter [R. 751, 774]. The statement was obviously prepared as an indictment of appellant Edgerton, and it refers to no fact or circumstance, except such as is calculated to reflect unfavorably upon this appellant. It accuses appellant of being responsible for everything in the way of loss, damage, misman-

agement, poor investments, or bad business judgment occurring over a period of more than four years. These charges are not confined to the charges contained in the indictment, but cover every act or transaction which in the mind of the declarant was calculated to discredit appellant Edgerton.

The following statements and outline constitute the entire substance of the exhibit:-

(1) That "high pressure salesmen" were sent out to contact the security holders and that these holders were "apparently promised and told anything and everything in order to obtain their consents" to the plan of reorganization. [R 755]

(2) No plan of exchange of securities was "consistently" followed. [R 755]

(3) The so-called plan was "so long and so complicated that it was apparently understood by nobody." [R 755]

(4) "Lobbyists were then put to work to procure the passing of enabling legislation" to make possible the reorganization. [R 756]

(5) "At this time J. Howard Edgerton, an attorney was added" to the "controlling directorate." [R 756]

(6) "To put the deal over a deal was made with Charles E. Kenner, a graduate of Sing Sing Prison for the misuse of other peoples' money and now in Folsom penitentiary for the same reason." [R 756]

(7) "The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and those they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the

history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted." [R 756]

(8) That about 80 per cent of the investors were "high pressured into the First Security * * *." [R 757]

(9) That there was "no notice of any stockholder's meeting"—except in the Los Angeles Daily Journal—"which is not read by the public at large." [R 758]

(10) That "Mr. Edgerton formed the R. F. D. Discount Company—" [R 759]

(11) That Battelle-Dwyer Company was to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid a premium of five points. [R 759]

(12) That "Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was secured free on the representation that it was without value." [R 760]

(13) That a deal for the exchange of a house on Stern Drive to Edgerton for bonds was handled through an escrow on which Edgerton borrowed approximately \$2300.00 on the same house from a third party to pay for the bonds and the costs of escrow. [R 760]

(14) That Edgerton sold this house later "for about \$4500.00 cash." [R 761]

(15) That Edgerton also bought another piece of property in Santa Monica. [R 761]

(16) That Edgerton bought bonds of the First Security "of a face value of \$11,750.00. The price paid was be-

tween 30 and 40 cents on the dollar." That these bonds were exchanged for the Santa Monica property. "This resulted in a book loss on the property of \$372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about \$7,000.00." [R 761]

(17) That Battelle-Dwyer Company overcharged \$1.00 per share on a thousand shares of First Security Deposit Corporation preferred stock which stock was delivered to Edgerton and Starr for the R. F. D. Discount Company, but the amount was later refunded to First Security Deposit Corporation. [R 761]

(18) That R. F. D. Discount Company had "voting control" of First Security Deposit Corporation. [R 762]

(19) That the stock would become very valuable "if the bondholders could be chased out of the picture cheaply enough." [R 762]

(20) That Kenner, in order to use the Railway Mutual "in some of his manipulations * * * approached Edgerton" * * * and it was arranged that R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to First Security for \$19,000 face value of securities which it owned in the Railway Mutual. That at the time all holders of First Security "were being assured by Battelle-Dwyer Company that it was worthless." [R 762]

(21) That P. S. Noon, needing money in mining operations "approached Edgerton and it looked like a very lucrative deal to him." He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money. That \$15,000 worth of Railway Mutual securities were borrowed from the R. F. D. Discount Company

and Edgerton hypothecated the Railway securities to a third party for the money loaned to Noon. That the mining deal failed. [R 763]

(22) That Edgerton formed the State Investors Corporation, consisting of his father and a former employee of the First Security Deposit. That it was "entirely devoid of any financial backing," yet a contract with First Security was entered into whereby First Security Deposit would sell \$187,000.00 book value of designated real property to State Investors. That this purchaser took immediate possession of the properties and rents without obligation to make any payment other than taxes for one year. That it could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property or could pay in cash at the rate of 40 cents for each dollar of book value. That this arrangement was "so entirely bad and unsatisfactory" to the First Security Deposit that it was "cancelled by mutual consent after about six months." [R 763-4]

(23) That Investment Finance Company, "organized and operated in conjunction" with First Security, "has engaged in many activities most of which have resulted in frozen assets." That the Kenner deal which resulted in a loss of about \$25,000.00 "was consummated by Edgerton. Deals with Kenner have cost about \$75,000.00." [R 765-766]

(24) That one director stated that the writing of certain letters with regard to the First Security being in liquidation "was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. * * * Edgerton finally decided that no letters should be written out of the State of California." [R 767]

(25) That "Edgerton became interested in the Western Brick Company and caused Investment Finance Company to invest about \$30,000 therein * * * he * * * acquired some free stock * * * in the transaction." That there was a "freezing out of minority stockholders in the Western Brick Company" and that that Company "has operated at a loss since acquisition." [R 767]

(26) That Edgerton "* * * presented a deal" whereby stock of a Santa Monica bank, which had assets equivalent to about \$71.00 per share, was bought by Investment Finance Company at the rate of \$150.00 per share and a loan was made to Battelle-Dwyer Company on 167 additional shares at the rate of \$150.00 per share. That Edgerton and Dwyer were voting trustees holding stock control of the bank. That Battelle-Dwyer Company failed to pay its loan and the Investment Finance acquired their bank stock. [R 767-768]

(27) After referring to alleged bad investments in two other companies, the statement continues "none of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between \$300,000.00-\$400,000.00." [R. 769-770]

(28) That "Edgerton is attorney for all of these companies and actually runs them." [R 770]

(29) That in order to qualify as a director of the American National Bank, Edgerton entered into "a subterfuge to get around the requirements of the government" by giving a promissory note for certain stock without any intent to pay therefor. Edgerton's stock being held in the

office of the Investment Finance Company, was assigned in blank. [R 770-1]

The foregoing charges run the whole gamut of corporate mismanagement, abuse of trust, deception and outright dishonesty, corruption and fraud. Obviously the matters related in this statement were highly inflammatory. The document itself consisted almost entirely of statements of the declarant's opinion of the character and conduct of this appellant, wholly derogatory in nature, and stated in such graphic fashion that their insidious effect upon the jury, could not be removed by any formal limitation of purpose of the evidence. Furthermore, there is not the slightest basis for the contention that any of these charges contained a single statement of any relevant or material evidentiary matter.

The charges covered a subject matter far beyond the scope of the indictment.

None of the charges above summarized and contained in the statement, is supported by any substantive evidence.

THE ACCUSATORY STATEMENTS OF THE DEFENDANT TWOMBLY WERE INADMISSIBLE AS HEARSAY.

The trial court admitted the accusatory statements in their entirety upon the theory that they were proper to be considered in determining the intent of the parties, and instructed the jury that they were to consider the statements for the purpose of showing what was "the mental state, what was going on in the minds of the parties" and "in relation to the intent, if any, that Twombly may have had with reference to his participation in the alleged scheme and artifice to defraud prior to December 21, 1938, when he severed his connection." [R. 1031.]

The Court also instructed the jury that "there is no evidence before you as to when, after the defendant Twombly separated from said companies, he wrote said statement, except as I have just stated." [R. 1031.]

The testimony referred to was that of plaintiff's witness Webster, that he had interviewed Twombly about the statement on July 9, 1940, and was told by him that it was the statement that he had given to Inspector Van Meter [R. 751, 774].

The Court further instructed the jury that—

"As a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit, December 21, 1938 * * *." [R. 1032.]

Thus the Court told the jury as a matter of law a statement whose only identifying date was July, 1940 (when it was identified by Twombly in his conversation with plaintiff's witness Webster), must be presumed to have been prepared prior to the disassociation of Twombly, despite an entire absence of evidence in this regard.

In ruling in this manner, the Court has not only endeavored to supply the entire absence of foundation, but has instructed the jury affirmatively that the pre-existence of the document is to be assumed as a matter of law. The burden is upon a party offering testimony to show that it meets the requirements of the rules of evidence. To avoid the hearsay rule the party must bring himself within the terms of some exception. This he can do only by an affirmative showing in this regard of the circumstances invoking such exception. The case of the prosecution fails utterly to show any of the circumstances surrounding the execution of the Twombly statement and

fails utterly to comply with any of the tests of the hearsay rule. The receipt of the statement in evidence to show mental condition, or intent, can only be justified where it affirmatively appears that the statement is one of a present existing state of mind, *i.e.*, contemporary with the act under inquiry.

“* * * the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person’s own *contemporary statement of his mental or physical condition.*” (Emphasis by the author.)

VI Wigmore, Evidence, Sec. 1714, p. 58.

“The only limitation as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this exception (*ante*, Sec. 1714), namely, the statements must be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion.” (Emphasis by the author.)

VI Wigmore, Evidence, Sec. 1725, p. 80.

The “circumstances of suspicion” referred to by the author, as indicated by the quotations in the footnote, include any “suspicion of an intention to make evidence to be used at the trial.”

In *Wigmore, Evidence*, Third Ed., Sec. 1729, p. 90, it is pointed out that a declaration is not admissible to show mental condition unless it attends an act otherwise ambiguous and is made *at the time of the act*.

The author states:

“Moreover, when it is relevant and therefore provable, it is commonly so only when attending an act

otherwise ambiguous and equivocal" (p. 90) * * * "Moreover, since the person's intent at the time of the equivocal act is alone material, his declarations of intent made at a former or subsequent time are declarations of an immaterial fact. His subsequent declarations of a past intent are, furthermore, of course not admissible under the present exception; * * *

And at page 197 (Sec. 1776) under the caption

"*Words must accompany the conduct in time,*" the author states: "Since the words are used only as verbal parts of the whole act, filling out and giving legal significance to the conduct, it is obvious that the words must be *contemporaneous with the conduct*, or, in the usual phrase, must accompany the act." (Emphasis by the author.)

The same rule is laid down in *Eppinger v. Scott*, 112 Cal. 369, 374; *Adkins v. Brett*, 184 Cal. 252, 255; *Fidelity & Cas. Co. v. Haines* (C. C. A. 8), 111 Fed. 339-340.

In 20 *Am. Jur.*, Sec. 585, page 491, the same rule is stated:

"Assuming that the state of mind of a person at a particular time is relevant, his declarations *made at that time* are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party."

Continuing the text points out, pages 492-3:

"On the other hand the declarations of one party are not admissible to prove what was in the mind of the other party when making a statement."

In *Lane v. United States* (C. C. A. 8), 34 Fed. (2d) 413, 415, the Court said, with respect to testimony that one of the parties to the scheme to defraud (who was not on trial) had said that the scheme had worked in a number of places and that he had served jail terms for operations of the same kind:

“The admission of this testimony seems to be violative of the most elementary rules of evidence. The testimony elicited was palpably hearsay, unless it was admissible on the theory that it constituted the declaration of a co-conspirator. It was not made in the presence of the defendants on trial; it constitutes no part of the *res gestae*, and, if it be conceded that a conspiracy between Cushman and the defendants had been established, certainly there was nothing to show that these statements by Cushman were made during the existence of any such conspiracy. They apparently constituted a narrative of past events by which the declarant sought to exculpate himself and inculpate his codefendants, and they were not made in furtherance of the conspiracy or common design.”

Obviously, even if the Twombly statement had been made, as the Court erroneously instructed the jury, on December 21, 1938, it would be wholly irrelevant and incompetent, as that is the day on which he, according to the Court’s instruction to the jury, severed his connection with the various companies. Furthermore, there is no act of his alleged or proved to have occurred on December 21, 1938, the intent of which this statement could evidence; and even if it had been made on that date, it could not evidence the intent of any prior act or conduct of that defendant.

But as we have said, there can be no presumption that the statement existed prior to its actual exhibition to plaintiff's witness, and in view of the prosecution's failure to make a definite showing in this regard, the presumption is directly contrary to that declared by the Court, and is and must be that the statement had no existence prior to the date of such actual exhibition, *i. e.*, more than a year and a half subsequent to December 21, 1938.

The Court's error in this regard was accentuated by an instruction which required the jury "to determine whether or not the defendant Twombly believed the said statements were true or false when made," and also, "to decide whether or not the information thus received if it was in truth and in fact received prior to his disassociating himself from said defendants and said companies" (the Court had already instructed the jury that such was a presumption of law), "and thus construed by said defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies" [R. 1032].

The Court thus inexplicably placed in issue before the jury, the truth or falsity of these entirely collateral charges and gave them substantive force in themselves as matters to be considered by the jury as actuating Twombly in disassociating himself from defendants. With the emphasis thus placed by the Court upon the accusatory statements of this witness, it was inevitable that no mere instruction to limit the effect of the evidence could operate to eradicate from the minds of the jury the impression necessarily conveyed by such statements. The Court thus extends the scope and effect of this evidence beyond its original purported limited purpose and permits

it to stand as substantive evidence in the case to determine whether it actuated Twombly's resignation, and not as evidence limited merely to the question of the declarant's state of mind.

This Court had before it a somewhat similar situation in *St. Clair v. United States* (C. C. A. 9), 23 Fed. (2d) 76, 78, where the trial court permitted the government to introduce accusatory letters from the Secretary of the State of Washington to the company and its fiscal agent. The letters, together with the replies, were offered "to show knowledge"—just as in the present case, the Twombly statement was offered to show "intent" (and the Campbell report to show "knowledge," *infra*, p. 119).

This Court said in reversing a judgment of conviction:

"The purpose for which this correspondence was offered is not made entirely clear. When the offer was made, the court inquired, 'Are there any admissions?' meaning, of course, any admissions on the part of the defendants. To this inquiry, counsel for the government replied, vaguely and somewhat irrelevantly, 'To show knowledge, if the court please.' The court thereupon admitted the correspondence in evidence, instructing the jury that they could only consider the letters of the secretary of state for the purpose of enabling them to understand the responses thereto by the defendants, and that they should not consider as true, as against the defendants, any statements contained in the letters written by the secretary of state. To the ruling of the court, an exception was allowed. Of course, if the letters written by the defendants to the secretary of state contained admissions against interest, they were en-

tirely competent, and if the letters could not be properly understood, except in connection with the letters written by the secretary of state, the latter were also competent within the limits specified by the court.

The government does not claim, however, that the letters written by the defendants contained anything material to the case. Indeed, the letters were all self-serving and should have been ruled out as incompetent if offered by the defendants in their own behalf. Furthermore, the letters written to the secretary of state could be readily understood without any reference to the letters from the latter. In other words, we can see no possible motive for offering this correspondence, except to get before the jury the incompetent, prejudicial statements contained in letters written by a state officer, condemning the enterprise in which the defendants were engaged as a swindle."

In *Hart v. United States* (C. C. A. 2), 240 Fed. 911, 917, an attorney for one of the companies having dealings with defendants, wrote a letter to defendant Hart accusing him of a considerable number of crimes and falsehoods. It was shown that this letter, and the accuracy of the statements therein had been discussed by Hart and the attorney. As to the ruling admitting the letter in evidence as to the statement made to defendant, the Court said:

"The reason is a novelty, and the action amounted to permitting a reputable member of the bar, a man of vigorous personality, substantially to make a speech, stating his very low opinion of one or more of the defendants. There is no pretense that what was said in the letter could have been repeated *viva*

voce by the witness to the jury; yet such was its practical effect when read to the jury, the writer sitting by in the witness chair. This was grave error."

If there are any portions of the 17 page document which are properly admissible, and we submit there are none, only such portions, if any, of the document as are properly admissible, should have been received in evidence.

In *Sartain v. United States* (C. C. A. 5), 16 Fed. (2d) 704, 706-707, the Government, for the declared purpose of proving one Baughn was not paroled for the purpose of testifying before the grand jury as had been intimated, introduced in evidence a resolution of the grand jury. The Court said:

"The resolution was clearly inadmissible, for it had no tendency to contradict, but, on the other hand, corroborated, the circumstances admitted on cross-examination in regard to the granting of the parole. If it had been admissible for that limited purpose it *was wholly unnecessary to put before the trial jury the whole resolution.* Only such portions of a document as are admissible should be offered or received in evidence. *Those portions which might create prejudice against the defendant should be excluded.* Bates v. Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. Ed. 106; Boykin v. United States (C. C. A.), 11 F. (2d) 484; Berry v. United States (C. C. A.), 15 F. (2d) 634 (present term). The recital that Baughn's reputation was good was nothing but hearsay, pure and simple, and, of course, should have been excluded." (Emphasis supplied.)

THE ATTEMPTED LIMITATION OF THE EVIDENCE WAS
INEFFECTIVE TO ASSURE A FAIR TRIAL.

The Court in emphasizing that the accusatory statements were evidence of a state of mind of the defendant Twombly and were to be considered in relation to the question of whether or not he believed they were true, and whether or not they actuated him in disassociating himself from defendants, gave a far wider scope to this evidence than can be justified under any of the decisions.

But, if the Court had placed a proper and concise limitation upon the consideration of the evidence, its character is such that under no possible view can it be assumed that the jury would not be consciously or unconsciously influenced by the accusations made. As the Supreme Court has stated in a recent case, "The reverberating clang of those accusatory words would drown all weaker sounds."

In *Shepard v. United States*, 290 U. S. 96, 78 L. Ed. 196, declarations of a victim of an alleged homicide to the effect that she had a suspicion that she had been poisoned by her husband were admitted. The prosecution contended that they were admissible as negativing the theory of suicide and defendant's evidence as to her declarations of weariness with life. There was no limitation upon the evidence, but the Supreme Court held no limitation would have been effective, saying:

"It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of

those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on Ev. 266, 516; Wigmore, Ev. 1421, 1422, 1714.

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. (Citing cases.) Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. * * * So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another, may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 S. Ct. 909, *supra*. The ruling in that case marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, *pointing backwards to the past*. *There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.*

The testimony now questioned faced backward and not forward. This at least it did in its most obvious

implications. What is even more important, it spoke to a past act, AND MORE THAN THAT, TO AN ACT BY SOME ONE NOT THE SPEAKER. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.” (Emphasis supplied.)

In the recent case of *Anderson v. United States*, 87 L. Ed. Advance Sheets 589, 592, 593, the Supreme Court held that the improper admission of evidence against *some* of the defendants in a criminal case requires a reversal as to all defendants.

“There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others.”

In *Whealton v. United States* (C. C. A. 3), 113 Fed. (2d) 710, 715, two statements dictated and signed by defendant Coffin were admitted in evidence “as to Coffin alone.” As to the first statement containing the following: “I do not condone any of the offenses nor by the same token do I excuse what may appear to be compounding a felony,” the Court said:

“In no permissible view, was the exhibit competent as evidence against anyone. It contained no facts relevant or material to the establishment of the crime charged. It merely implied a legal conclusion of Coffin without reciting the facts whereon the conclusion was based. At best, it was no more than an opinion and therefore incompetent as a matter of evidence.”

After pointing out that the possibility of harm from the improper admission of this statement was substantial, as to all defendants, and that the statement could not be considered as having been made in furtherance of the scheme to defraud, the Court said:

"While the limitation of the admission of the exhibit as to Coffin fixed the extent of its legal purview with respect to the several defendants, it is impossible to believe that its effect could be so discriminately limited in the minds of the jury. The really practical effect of the improperly admitted exhibit was to predispose the jury to belief in the defendants' guilt because of Coffin's implied opinion that 'offenses' had been committed. It was the jury's duty to draw the conclusion of the defendants' guilt or innocence from the competent, relevant and material testimony in the case and not from unsupported opinions of anyone. The failure to exclude Exhibit G-8 rendered the jury's proper discharge of its duty improbable.

What we have herein said with respect to the impropriety of Exhibit G-8 as evidence against any of the defendants applies equally to Exhibit G-313, a further statement dictated by Coffin, in which he said that it was his duty 'to go to the criminal authorities and report the facts, so that the officers and directors of the corporation could be prosecuted.' As before, this exhibit was admitted in evidence, over objection, only as to Coffin. The court cautioned the jury that opinions expressed by Coffin in the statement with respect to the guilt of other defendants was not evidence against them. But, the harm was done by the admission of the incompetent evidence and no amount of caution could take the sting of its implications from the minds of the jury. This statement spoke

of ‘facts’ but recited none. It likewise represented no more than Coffin’s opinion and was not competent as evidence against anyone including himself.”

In *Holt v. U. S.* (C. C. C. 10), 94 Fed. (2d) 90, 93-94, the indictment charged a scheme to defraud by representing an imposter to be an heir to valuable oil property. The Court admitted the imposter’s purported dying declaration giving a complete narrative of what had occurred between the imposter and his alleged co-conspirators.

At the close of the case the Court withdrew the statement and instructed the jury to disregard it.

In reversing the judgment the Court said:

“Clearly the admission of the statement was prejudicial error.

It is the general rule that error in the admission of evidence is cured by withdrawing the evidence from the consideration of the jury and instructing the jury to disregard it.

However, where the character of the evidence is such that it is likely to create so strong an impression on the minds of the jurors to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a mistrial should be ordered.

The statement purported to be a dying declaration. It was a full and complete narrative of what occurred between Alexander and his alleged co-conspirators from the beginning. It was before the jury from early in the trial until the close of the evidence. It must have made a deep and lasting impression on the minds of the jurors. It squarely contradicted Holt’s defense that he did not know Alexander was

an imposter, while the competent evidence on that issue was far from conclusive.

We doubt that it was possible for the jury to efface the statement from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do.

We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted. (Citing cases.)”

In *Lockhart v. U. S.* (C. C. A. 9), 35 Fed. (2d) 905, 906, this Court held that the action of the trial court in granting a motion to suppress all testimony based upon an illegal search of premises and in instructing the jury to disregard it, could not have eradicated the injurious effects of the evidence, saying:

“The question for decision therefore is this, May a court admit incompetent, prejudicial testimony before a jury and cure the error by withdrawing the testimony from the consideration of the jury at the close of the trial? That this may be done as a general rule is well settled; but there is an exception to the general rule as well established as the rule itself. . . .

This case falls within the exception and not within the general rule. As already stated, the testimony wrongly admitted was highly prejudicial in its nature, and its effect could not be entirely eradicated from the minds of the jury by a simple instruction to disregard it. It certainly cannot be said that such testimony would not unconsciously affect the verdict, however much the jury might be disposed to follow the instructions of the court.”

As stated in *Adkins v. Brett*, 184 Cal. 252, 258-9, 260, 261-2:

“If the point to prove which the evidence is competent can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. . . . This would emphatically be true where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent.”

The prejudicial character of the Court’s ruling admitting in evidence the unsworn embittered accusations of the accomplice and co-indictee Twombly is clear from the foregoing summary.

In this situation the remark of the Court in *People v. Westcott*, 86 Cal. App. 298, 318, is peculiarly apt:

“Is it possible that any jury, after hearing such evidence, in such a case, can erase it from their minds and not be influenced by the accusatory declaration, merely because the court tells them to consider the evidence only in passing on the credibility of a witness? . . .”

In *People v. McKelvey*, 85 Cal. App. 769, 771, the Court held that the fact that the trial court had ordered the objectionable evidence as to bad character stricken from the record and had instructed the jury to disregard the testimony as though they had never heard it, did not insure a fair trial.

The Court said:

“It was an intellectual impossibility for the jury to wholly erase such testimony from their memory and to disregard it as though they had never heard it.”

The prejudicial effect of this unsworn series of charges was increased, if such were possible, by the trial court’s reception in evidence of the fact that various collateral transactions referred to in the charges were in fact entered into. Such substantive evidence could not fail to lend a cloak of truth to the charges relating to such transactions. (Point XV, *infra*, p. 158.)

POINT VII.

Assignment of Error XXX.

The District Court Erred in Denying Motion of Appellant Edgerton for a Severance Made at the Time of the Offer of Plaintiff’s Exhibit 216 in Evidence and Renewed at the Conclusion of All of the Evidence in the Case.

Assignment XXX is as follows:

“Said District Court erred in denying the motion of defendant Edgerton for a severance made at the time of the offer of Plaintiff’s Exhibit 216 in evidence and upon the conclusion of all of the evidence in the case.” [R. 1173.]

All of the grounds of said error in denying said motion were set forth in full in Assignment of Error XXIX and this assignment incorporates the same by reference. Said Assignment XXIX is set forth in full in the appendix hereto at page 7.

The motion for severance referred to in the foregoing assignment and the ruling of the Court thereon appear in the Bill of Exceptions at pages 775 to 788 of the record.

The prejudicial nature of the Twombly accusatory statement has been shown in our discussion of the preceding Point VI (*supra*, p. 91), and the same authorities which establish the inadmissibility of said accusatory statement as against this appellant would require that his motion for severance be granted, where as in this case the prosecution elects to use the accusatory statement.

Appellant's counsel were not only unaware of the existence of the Twombly accusatory statement, but had been affirmatively assured by the defendant Twombly and his counsel that no such statement was in existence. [R. 775-786.] The grounds asserted in support of the motion for severance clearly show that the appellant Edgerton was taken by surprise, that the statement implicated Edgerton and by its exculpation of Twombly and inculpation of Edgerton showed the additional basic ground of antagonistic defenses.

Where, as in this case, the prosecution relies upon the statement of one defendant, the admissions of which would necessarily be prejudicial to the other, the rule is clear that either the statement must be withheld from evidence or a motion for severance must be granted.

The Supreme Court said in the case of *Shepard v. U. S.*, *supra*, 290 U. S. 96, 78 Law. Ed. 196:

“When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.”

The complete divergence between the principle announced by the Supreme Court and the theory of the trial

court herein is demonstrated by the trial court's statement in denying the motion for severance:

"The Court: * * * Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall? * * *." [R. 785.]

In *Hale v. United States* (C. C. A. 8), 25 Fed. (2d) 430, 438-439, a reversal was ordered for failure of the trial court to order a separate trial of the abettor where the government relied upon a confession of the principal.

The Court said, after pointing out that the confession of Ramsey, the principal was incompetent to bind Hale, the alleged abettor:

"The court so stated when it was admitted, and again in its charge; but it is inconceivable that the impression made upon the minds of the jurors could have been removed by these formal remarks of the court. Plaintiff in error is indicted as an abettor of Ramsey. Under ordinary circumstances, a joint trial would be proper procedure. * * *

"The balance of the statement or confession would not be binding upon Hale, and if admitted would leave upon the minds of the jurors a lasting impression to his prejudice. The unavoidable mischief of a joint trial is thus made clear. The entire confession, if admissible and voluntary, as has been stated, would be competent as to Ramsey. Its admission in its entirety would be necessarily prejudicial to Hale, as we have indicated; but, on the other hand, the exclusion of the part involving Hale would place the government at a serious disadvantage in its prosecution of Ramsey, because, among other things,

the motive for the crime would be absent from the confession. It seems to us that these considerations are decisive against a joint trial."

In *Peo. v. Buckminster* (Ill.), 274 Ill. 435 (113 N. E. 713), it was held that on a trial of two defendants jointly charged with arson it was error to admit for impeachment purposes, the involuntary confession of one defendant although the jury were instructed to disregard the confession as affecting such codefendant.

"Even if it be assumed that the confession could be admitted against Fink for the purpose of impeaching him if he were being tried alone, we do not think that part of his confession which affected Buckminster, in view of the record before us, should have been admitted for any purpose when Buckminster was on trial jointly with Fink. . . . To obviate the evils arising from the possibility of the jury being misled by such confessions against the codefendant the rule is general that, where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the state declares that such admissions or confessions will not be offered in evidence on the trial. . . . It is very clear from all the authorities that the courts have realized the evils of admitting confessions on behalf of one defendant that implicated a codefendant, even though limited by the trial court to the person who made the confession, and have only permitted such a confession to be admitted, when two were being tried jointly, because there

seemed no practical way of reaching a right result, under the law, as to the person who made the confession, without admitting it; that the injury as to the codefendant might be less than the evil that would arise in the enforcement of the criminal law if the confession were shut out entirely."

As to the prejudicial effect of the evidence the Court held that notwithstanding the instruction limiting the effect to a particular defendant, if there were any doubt as to defendant's guilt, the jury would find it difficult or impossible to remove from their minds the impression produced by the confession, which naturally would warp and prejudice their minds.

In *People v. Sweetin*, 325 Ill. 245, 156 N. E. 354, 357, the Court held it was an abuse of discretion to deny a separate trial where the confession of a codefendant was relied on, the Court saying:

"While the court instructed the jury that Hight's confessions were not admissible as against plaintiff in error, such instruction could by no possibility eradicate the testimony from the minds of the jury. While theoretically the instruction withdrew the evidence from the consideration of the jury, practically the human mind is so constructed that inevitably the prejudicial effect remained therein . . . To obviate the evils arising from the possibility of the jury being misled by the confessions of a codefendant, the rule is general that, where one of several defendants jointly indicted has made admissions or con-

fessions implicating others, a severance should be ordered, unless the attorney for the State declares that such admissions or confessions will not be offered in evidence on the trial."

In *Randazzo v. U. S.* (C. C. A. 8), 300 Fed. 794, the Court held that no error was committed in the particular case by reason of the fact that the confessions admitted against the codefendant Randazzo did *not* implicate defendant Evola. The Court, however, did state that the situation would be different if the confession had implicated Evola. The Court said:

"It is contended that there was error, as against defendant Evola, in the admission of certain evidence which tended to prove the guilt of Randazzo, but which had no reference to said Evola, and neither tended to prove his guilt or demonstrate his innocence . . . The cases cited by counsel for defendant Evola are cases wherein the confession of one defendant, jointly tried with another, were admitted against such other, though containing evidence of the guilt of the defendant, who had no part in the confession. Of course, many cases hold that this would be error but that is not the situation here . . . As forecast, the situation might have been different, had the alleged confessions of Randazzo, made after the commission of the crime, connected Evola with the commission thereof."

POINT VIII.

Assignment of Error XXXI.

The District Court Erred in Denying the Motion of the Appellant Edgerton for a Mistrial Because of the Introduction and Receipt in Evidence of Plaintiff's Exhibit 216.

Assignment XXXI is as follows:

"Said District Court erred in denying the motion of the defendant Edgerton that the Court withdraw a juror and thereupon declare a mistrial because of the introduction and receipt in evidence of plaintiff's Exhibit 216." [R. 1173.]

Said assignment then recites and by reference it adopts as grounds for said motion all of grounds set forth in Assignment XXIX, which said assignment is printed in full in the appendix hereto at pages 7 to 34.

The motion referred to in the foregoing assignment and the ruling of the Court thereon, appear in the Bill of Exceptions at page 788 of the record.

The arguments addressed to points VI and VII are adopted as the Argument addressed to this Assignment of Error.

See especially the cases *supra*, pages 98, 104, 109.

POINT IX.

Assignment of Error XXV.

The District Court Erred in Admitting in Evidence Plaintiff's Exhibit 46 Over the Objections and Exceptions of the Appellant and in Denying the Motion to Exclude the Portion Thereof Containing Hearsay *Ex Parte* Comments, Opinions and Conclusions of the Author.

The Assignment of Error to which the discussion under this topic will be directed relates to the admission in evidence of a portion of Exhibit 46 and denial of the motion to exclude the same. The portion of the exhibit involved is the report of H. Dean Campbell, a public accountant, accompanying his audit of the books of the Investment Finance Company. This report contains the *ex parte* comments, opinions and conclusions of the author, many of which were highly prejudicial.

Said Assignment of Error appears in full in the appendix hereto at page 34 and succeeding pages.

The ruling to which the said assignment relates appears in the Bill of Exceptions at pages 617, 921-922 of the record.

The objections, motions and proceedings to which said ruling relates appear in the Bill of Exceptions at pages 615-617, 916 of the record.

THE CHARGES CONTAINED IN THE CAMPBELL REPORT.

After presenting the question of whether the Investment Finance Company and the First Security are so closely interlocked as to appear identical in effect; whether profits which might accrue to First Security would be di-

verted to the narrower limits of the fewer shareholders of the Investment Company to the loss of shareholders in the former company, and whether funds used to promote the various enterprises were basically the funds of First Security, the report proceeded to state that the questions should be answered as to whether the following substantially constitute fraud [the report expressly assumes the existence of said circumstances]. [R. 625]:

“The purchase of First Security Deposit Corporation bonds at a discount, and the re-sale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to the others?” [R. 626];

“Taking over the Wilshire Insurance Agency, and directing commissions formerly earned by the First Security Deposit into the income of the Investment Finance?” [R. 626.]

That there had been “reinvestment in such mismanaged enterprises as Bonds-17” [R. 626];

That reinvestment in some of these companies “might on its face be construed to be fraud and mismanagement” [R. 626];

That “in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact and still further, might bring the company (Investment Finance) under the S. E. C. because they were sent through the mails out of the state” [R. 626, 627];

That "in summarizing, it might appear that it might be difficult to justify legally the existence of the company in any particular, as it is now operating." [R. 627.]

The charges contained in the Campbell report were inadmissible as (1) hearsay, (2) relating to transactions outside the issues, and (3) were incompetent for the limited purpose for which they were admitted, *i. e.*, having no tendency to show intent on the part of defendants.

No issue was raised by the indictment as to the propriety of purchase of First Security bonds at a discount and resale to the company at par, nor as to retaining profits of such transaction in Investment Finance Company. Likewise, there was no issue as to diverting commissions formerly earned by First Security through Wilshire Insurance Company into the income of the Investment Finance Company, nor was there any evidence that this occurred or that such an insurance company existed. There was no issue as to the mismanagement of investments or enterprises nor as to the legal justification for the existence of the Investment Finance Company. Any misstatements of fact claimed to have been made were to be resolved by the jury uninfluenced by the opinion of Mr. Campbell.

All the charges, also, were clearly inadmissible within the rule that collateral transactions are inadmissible to establish a scheme to defraud.

In *Gold v. U. S.* (C. C. A. 8), 36 Fed. (2d) 16, 33, the indictment alleged a scheme to defraud by the use of the mails in the sale of bonds and stock of joint Stock Land

Bank. It was held that evidence of other independent transactions was inadmissible, the Court saying:

“Evidence was allowed to be introduced showing the amount of compensation Guy Huston received from the Southern Minnesota Bank for selling its bonds prior to the transactions here in question; also that he received compensation from several other Joint Stock Land Banks for selling their securities. We think this evidence was inadmissible. Those transactions were entirely independent of the scheme alleged in the indictment. It was not shown or offered to be shown that all of the transactions were part of one system or plan being carried out by Guy Huston. It was not claimed that what was done by Guy Huston for which he was being tried was done unwittingly or unintentionally. On no ground that occurs to us were his independent dealings, either with the same bank or with other banks, admissible to prove the charges made against him in the indictment in the case at bar.”

The cases are clear that an auditor or accountant is not even permitted to testify as to the ultimate questions to be determined by the jury; his testimony must be confined to the facts as revealed by the records and books. So that in the present case Mr. Campbell, even if called as a witness, could not have testified to the conclusions contained in the report (and he was present in the court room); much less, can his unsworn charges be received [R. 1166].

THE CAMPBELL STATEMENT COULD NOT BE ADMITTED AS EVIDENCE OF INTENT OR KNOWLEDGE ON THE PART OF DEFENDANTS WITHOUT ASSUMING THE TRUTH OF SUCH CHARGES, I.E., GIVING THEM THE EFFECT OF SUBSTANTIVE EVIDENCE.

In the case of *St. Claire v. U. S.* (C. C. A. 9), 23 Fed. (2d) 76-78, *supra*, page 102, the trial court expressly instructed the jury that letters from the Secretary of State to the defendants could not be considered as true as against the defendants and the statements could only be considered for the purpose of "showing knowledge" and of enabling them to understand the responses thereto by the defendants. This Court held that there was no basis for the admission of the letters to the defendant even within this limited scope, saying:

"In other words, we can see no possible motive for offering this correspondence, except to get before the jury the incompetent, prejudicial statements contained in letters written by a state officer, condemning the enterprise in which the defendants were engaged as a swindle."

While a document reflects the intent of the declarant it does not equally reflect the intent or purpose of the recipient (*supra*, p. 99).

The Court recognized this principle in instructing with reference to evidence of intent of defendant Twombly, when he authorized the jury to determine whether or not Twombly himself believed the matters related in the statement prepared by himself [R. 1032]. The effect of the instruction of the Court was that Twombly's statement would not even bind him if he did not believe the statements to be true.

Certainly the principle would apply equally to these defendants and they would not be bound by the Campbell report unless they believed the conclusions to be true. This rule is especially applicable to the defendants, as they did not prepare the report containing the charges which are relied upon as evidence of their intent or knowledge.

The error in admitting this evidence was aggravated by the use which the prosecution was permitted to make of it in their argument to the jury. Counsel for the prosecution was permitted to read the Campbell charges to the jury and to make the specific contention that the particular charges contained in the Campbell audit had been established by the proof [R. 960, *infra* Point X].

POINT X.

Assignment of Error XXVI.

The District Court Erred in His Rulings With Respect to Certain Motions to Instruct the Jury to Disregard Portions of the Remarks of Plaintiff's Counsel Concerning Plaintiff's Exhibit 46 Made in the Closing Argument to the Jury and in His Comments With Respect Thereto.

The Assignment of Error to which the discussion under this topic will be directed relates to the argument of plaintiff's counsel on the H. Dean Campbell report [Plaintiff's Exhibit 46], and the Court's comments made in connection with the proceedings thereon.

Said Assignment of Error appears in full in the appendix hereto at page 41 and succeeding pages.

The rulings to which the said assignment relates appears in the Bill of Exceptions at pages 953 to 960 of the record.

The motions and proceedings to which such rulings relate appear in the Bill of Exceptions at pages 953-960 of the record.

As we have seen in the preceding Point IX, the charges contained in the Campbell report were not properly admissible in evidence.

Counsel for the prosecution not only read the charges contained in the Campbell report, but asserted that these charges had been established as true. Counsel's illegal use of this evidence in order to accomplish the very purpose which prompted the Court's limitation of its use was error of a grave character.

In *Waldron v. Waldron*, 156 U. S. 361, 380-384, 39 L. Ed. 453, 458-460, the Court reversed the judgment, not so much upon the ground of the inadmissibility of the evidence in the first place, but by reason of its improper use by counsel in his argument. The Court said:

“It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor.”

“* * * The record which was admitted for a limited purpose had no tendency to establish her guilt of that charge, if used only for the object for which it was allowed to be introduced. * * * The admission of the record and other testimony having

been thus obtained, in the closing argument for plaintiff, all the restrictions imposed by the court were transgressed and the evidence was used by counsel in order to accomplish the very purpose for which its use had been forbidden at the time of its admission.

"Indeed, when the statements made by plaintiff's counsel in opening are considered, it seems clear that the failure to obtain the admission of the divorce proceedings in full left the case in such a condition that much of the subsequent testimony introduced, while it proved nothing intrinsically, was well adapted to fortify unlawful statements which might thereafter be made in reference to those proceedings. Thus, the case in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous."

Equally in the present case, the trial court had admitted the hearsay charges of the Campbell report for the limited purpose of the intent of defendants. Yet, counsel for the Government, in his closing argument, read these unsworn charges to the jury and asserted expressly that these charges, which he had read and which he again summarized in his argument, were true.

Prompt objection was made by the defendants but the trial court instead of censuring plaintiff's counsel or ordering the remarks to be withdrawn, permitted them to be continued so long as he did not go outside the record [R. 958, 959]. Plaintiff's counsel then read to the jury the conclusions of the report and proceeded to assert that the Government's evidence had established each of the

charges. The objection thereto was disallowed by the trial court [R. 960, 961].

There was some reliance by the prosecution in argument upon the theory that counsel for one of the defendants, by asserting that there was no evidence in this case in the first place "to support the charges that are made" [R. 957] had opened the door and thus justified Government's counsel in arguing the truth of the charges [R. 955, 956]. The Court stated in response to the defendants' objections to the above line of argument by the prosecution, "you were the one that raised it" [R. 956].

It is submitted that under the decisions it was incumbent upon the Court and counsel to confine the argument to the evidence and to the only legitimate purpose of that evidence under the rule of *Waldon v. Waldon, supra*, and that plaintiff's departure from this principle was not excused by the ambiguous assertion attributed to counsel for defendant.

In *People v. Cook*, 148 Cal. 334, 349, the prosecuting attorney in his closing argument went outside the record to reflect upon defendant's motive for the prosecution of one Ferguson. The trial court ruled that defendant's attorney by referring in his argument to the Ferguson trial, and to the action of defendant with reference to Ferguson, had "let the door open." The judgment was reversed, the Court saying:

"And it was no excuse for the misconduct that the counsel for defendant had referred in his argument to the Ferguson trial. In the case of *People v. Kramer*, 117 Cal. 650 (49 Pac. 842, this court said in response to this excuse for similar misconduct: 'Assuming that the comments of the district

attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court and have it stopped.' We cannot too strongly insist upon the observance of this admonition, as the only mode of confining criminal trials within proper limits, or conducting them with proper decorum, or—which is vastly more important—preserving the right of the defendant to be convicted only upon legal evidence addressed to the charge upon which he is being tried."

To the same effect is *People v. Simon*, 80 Cal. App. 675, 685.

POINT XI.

Assignment of Error XXVII.

The District Court Erred and Was Guilty of Misconduct Prejudicial to the Appellant Edgerton in Intimating, Suggesting, Requesting and Insisting that the Defendants Should Stipulate to Certain Facts Rather Than Require the Plaintiff to Prove the Same.

The Assignment of Error to which the discussion under this topic will be directed, relates to the misconduct of the trial court during the course of the trial, when he repeatedly intimated, suggested, requested and insisted that the defendants should stipulate to certain facts, rather than require the plaintiff to assume the burden of proving them.

The portion of said Assignment of Error relied on, is printed in full in the appendix hereto at page 49 and succeeding pages.

The various statements of the trial court to which said Assignment relates, is printed in the Bill of Exceptions, at pages 89-90, 99-105, 136-137, 143-145, 218-219, 231-232, 251-256, 267-268 and 611-615 of the record.

Throughout the trial, the Court exhibited the utmost impatience with any objections interposed by defendants which would require the prosecution to show a foundation for the admission of documents and other matters in evidence. The Court continually lectured the attorneys for the defendants to the effect that a vast amount of time was being consumed in technicalities, and expressly stated on several occasions that defendants should stipulate to the admission of various items of evidence. Finally, when a stipulation which had been entered into, was withdrawn by counsel for one of the defendants, the Court insisted that from that time on each defendant would be required to make an objection and take an exception to each ruling of the Court, and that the stipulation theretofore entered into with reference to continuing objections and exceptions to evidence of a similar character, would no longer be recognized. However, the trial court recognized the legal validity of the objections which he thus criticized, and when they were not withdrawn, he sustained them; but his attitude toward defendants' counsel and repeated censure were calculated to, and did convey to the jury the impression that defendants' counsel were obstructing continually the orderly trial of the case.

Incidents of such misconduct on the part of the trial judge will be briefly summarized:

(1) In connection with the offer of the Articles of Incorporation of First Security, and an amendment thereof, while the County Clerk was on the stand, and after one of defendants' counsel had suggested that until counsel could examine the documents during the recess, that said documents be marked for identification, and the prosecutor had himself requested that the documents be marked for identification, the Court stated in the presence of the jury,

"The Court: I am not in the habit of wasting the time of the court and jury on examinations of documents * * *. And now, clearly, there is nothing secret about these Articles of Incorporation and the Amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes." [R. 89, 90.]

"The Court: * * * We have a lot of things to take care of without a lot of *technicalities*. * * * I am not going to waste the time of myself and the time of the Jury while a lot of *technical* objections that are of no value, except to take the time of the court and jury, are entered into. Proceed." [R. 90.]

(2) At the very beginning of the case, and just prior to the examination of plaintiff's witness, Milton Shaw, Chief Examiner State Building and Loan Commission, the Court stated in the presence of the jury:

"The Court: * * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the court and jury to make the objection that the evidence is being put in out of

order, and that the conspiracy hasn't been yet proved and so on and so forth, where I am reserving to them the right to strike. * * * The only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. * * * If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the government to go and (get) the witness back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a *technical* point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to any one except the delight of the lawyer to make technical objections and have them sustained." [R. 100, 102, 103-104.]

(3) "The Court: * * * I see no way, unless we are going to be here to celebrate Christmas and New Years, to do it otherwise than to get these books before the court and get them in, * * *.

"But I shan't stay here until Christmas to satisfy a lot of *technical* niceties. * * *" [R. 136.]

"But we can conceivably, with five or six *technical* lawyers, take three weeks on one book. * * *

I have seen *technical* lawyers keep a court going for three weeks on getting in one book. That has

been in the past quite a common experience.” [R. 137.]

(4) “The Court: (With reference to the attorney’s duty to examine the records of the State Corporation Department and the Building and Loan Commissioner) —I don’t propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * * I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the *tricks* in the bag by way of *technicalities*, and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren’t getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State’s Office.” [R. 144, 145.]

(5) “The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, * * * and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it.” [R. 218.]

(6) During the examination of plaintiff’s witness Perkins, the Court stated before the jury:

“The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents

in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions.” [R. 232.]

(7) During the course of the examination of plaintiff’s witness Bruce, the Court stated before the jury after such witness had been asked to state from his examination what the by-laws provided as to the number of directors of a corporation, and counsel for defendant had interposed the objection—“That is not the best evidence.”

“The Court: I don’t feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of any one, all of this detailed information, when it is available in summarized form; * * * Why should we take ten days to accomplish a thing that can be done in a couple of hours.” [R. 251.]

(8) After counsel for appellant had stated that he had no objections to any chart or pictorial representation as to whatever the facts are, the Court stated in the presence of the jury,

“The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now what is your position?” [R. 254.]

When counsel stated that he was anticipating the witness attempting to summarize the minutes of the meeting of the board of directors, the Court stated:

"The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.

Now, I want to know: what is your position? You either object or you don't object." [R. 254.]

When counsel for defendant again protested that he was not trying to be obstreperous or to consume time, but was simply anticipating what the witness was going to testify as to the contents of the minutes, the following occurred,

"The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson, counsel for appellant) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by agreement of all counsel in order to save time. If you object to this witness testifying as to what he has gleaned from these books, your objections then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the Articles

of Incorporation, * * * dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation * * *. [R. 256.]

(9) During the course of the examination of plaintiff's witness Bruce, the Court volunteered the statement before the jury,

"The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made specifically and exception saved at each point as to each defendant." [R. 268.]

(10) After counsel for appellant had suggested that it would be necessary for him to ask whether some of the defendants were present at certain director's meetings and if any directors were absent, to interpose the objection of hearsay, the following occurred in the presence of the jury,

"The Court: You will have to make a *technical* objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time, the stock that was outstanding, etc., and we have to go back to the original; so there will be no other way to it, than for you to make objection.

Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make

objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly.” [R. 268.]

The foregoing instances typify the trial court’s attitude throughout the trial.

At the very beginning of the trial, and before the opening statement to the jury, the Court stated,

“The Court: * * * I am not interested in anything other than getting this case tried, and I don’t want to listen to a lot of unnecessary discussion. I say, eliminate all argument.” [R. 74.]

At the conclusion of plaintiff’s opening statement the Court suggested that counsel get up a chart to put the names of the different corporations down on the chart in large type designating eight different companies and inquiring of the jury—“Now, wouldn’t that be helpful to you gentlemen?” [R. 84-85.]

When defense counsel suggested that only three companies were involved, and that the addition of the names of the other corporations mentioned by counsel for the plaintiff in his opening statement and by the Court, would not be relevant to the case and would only lead to confusion, the Court stated:

“Well, it isn’t going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the Jury they are going to ignore it, * * * and yet I think the continuity is there * * *. [R. 86.]

The burden was upon the plaintiff to prove the crime charged and all the elements of that crime. It was improper for the trial court to transfer or attempt to transfer this burden from the plaintiff to facilitate the proof of plaintiff's case by the repeated insistences upon stipulations which would eliminate the requirements imposed by the law upon the plaintiff, or to deprive the defendants of their legal rights, including the right to object to hearsay evidence or to insufficient foundation.

That the Court's remarks were not provoked by any improper objections on the part of defendants' counsel, is evident from the fact that when the Court reached the point of ruling upon any of the objections which he censured so severely, he sustained such objections. Any other ruling by the Court would have been contrary to fundamental rules of evidence.

If any undue delay was occasioned by the fact that the prosecution offered in evidence bulky documents which had not theretofore been examined by defendants, it is obvious that counsel for defendants were not properly to blame for such delay. If counsel for the prosecution desired to present the case upon a stipulation as to the admissibility of any document, such document should first have been submitted to defendants' counsel. There is absolutely no evidence that this procedure was followed. Therefore, when defendants' counsel were confronted in Court for the first time by the offer of a large number of documents, it was entirely improper for the Court to make derogatory observations as to "criminal attorneys" and "legal technicalities" at every instance in which a proper objection to such evidence was inter-

posed, because of insufficient foundation or the hearsay rule.

The speedy conclusion of a criminal trial is not an end in itself. The principal solicitude of the law is to insure that justice is done. The strictures which the Court so often indulged in at the expense of defendants' counsel, could not fail to react unfavorably upon the defendants.

It has been held in many decisions of the Federal Courts that the foremost duty of the trial judge is to so conduct himself as to insure, that by no act or word of his, will the jury be influenced adversely to defendants.

In the recent case of *United States v. Minuse* (C. C. A. 2), 114 Fed. (2d) 36, 39, the Court said:

"In spite of the very strong case presented against them (defendants), we are constrained to hold that they did not get a fair trial, and that accordingly the judgment must be reversed." (p. 38.)

After referring to a number of rulings on evidence, the Court said with reference to the issue of misconduct on the part of the trial court:

"In other instances the court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses."

In *Lambert v. United States* (C. C. A. 5), 101 Fed. (2d) 960, 964, a judgment of conviction was reversed by reason of the brusqueness and severity of some of the remarks of the trial court which deprived defendant of a fair trial. During the cross-examination of one of the government witnesses, defendant's attorney repeatedly asked several questions, to which an objection was sustained, and counsel for defendant interpreted the trial court's ruling as in effect denying him the right to cross-examine. The Appellate Court pointed out that the questions propounded by the defense counsel were perhaps too general and that he had misunderstood the purpose or effect of the trial court's ruling, but stated,

“* * * the misunderstanding, pursued by counsel with persistence, perhaps with contumacy, caused so serious and heated a disagreement with the Court and an atmosphere so tense as to hinder, if not entirely prevent, a fair trial.

If it is replied to this that it was the untactful, contentious, disagreeable, and almost personally offensive manner in which appellant's counsel conducted his case which brought down upon him the very mildly disciplinary action of the court, the record plainly shows that appellant's counsel was, in good faith, if not with good judgment, tact and finesse, endeavoring to represent his client to the best of his ability. And in the end it was not counsel, but client, who suffered from his counsel's irascibility and provocativeness, and the District Judge's response to it. In situations of this kind, while the Judge

should certainly preserve and protect the dignity of the court the greatest care should be exercised in doing it, so as not to react upon the defendant himself, who at least as to the controversy between court and counsel, is a wholly innocent bystander."

In re Parkside Housing Project-Connor, etc., Ave.,
290 Mich. 582, 287 N. W. 571, 575-578, the Court said:

"It is error for the Court to comment, unfavorably, in the presence of the jury, on the conduct of the trial by counsel for one of the parties, especially in view of the fact that counsel, in such a situation, is without opportunity to resent such criticism without risk to himself and injury to his client's cause with the jury . . .

Even when counsel makes contentions which are not deemed sound, the trial judge should overrule them with dignity, and not use language holding counsel up to ridicule . . .

Judges are required to exercise great care to say nothing in the hearing of the jurors while a case is progressing which can possibly be construed to the prejudice of either party . . ." (p. 577.)

"Judicial intimation, derogatory remarks, ridicule and harassment on the part of a judge during the trial of a case have no place in a court of justice." (p. 578.)

To the same effect is:

Davis v. Pezel, 131 Cal. App. 46, 50-54 (Opinion by Justice Stephens).

POINT XII.

Assignment of Error XXVIII.

The District Court Erred and Was Guilty of Misconduct Prejudicial to the Appellant Edgerton in Statements Made Before the Jury.

The Assignment of Error above referred to relates to statements of the District Court in the presence of the jury which were greatly prejudicial to the rights of the appellant.

Said Assignment is set forth in full in the appendix hereto at page 71 and succeeding pages. The statements of the Court upon which error is assigned, appear in the Bill of Exceptions at pages 197-198, 227-228, 251, 616-617, 679-680, 698 and 818 of the record.

This Assignment of Error must be considered in connection with the assignment previously discussed, which latter assignment is incorporated in the present assignment by reference in certain particulars [R. 1140]. The incorporated paragraphs referred to contain the matters summarized in paragraphs (1), (2), (6), (7), (8), (9) and (10), respectively, Point Number XI, *supra*, pages 130, 132-135.

Additional instances of misconduct may be summarized as follows:

(1) During the course of the examination of plaintiff's witness Florence Anderson, the question was asked "Can you definitely state that those names which I have

given you with the addition of Brayton were directors as of that date?" Counsel for defendant suggested:

"Mr. Irwin: Pardon me, your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him, I think we are entitled to have the entire board."

Thereupon, the Court stated:

"The Court: Now, I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * *. You may bring out those matters on cross-examination and *I shall not tolerate any more interruptions of that sort.*" [R. 197-198.]

(2) During the course of the examination of plaintiff's witness Perkins, plaintiff's counsel asked permission from defendant's counsel to remove two letters attached to an exhibit which had been offered and received in evidence. After counsel for defendant had consented, the following occurred:

"The Court: Just say yes and save a lot (of) time.

Mr. Lawson: Your Honor, I want to call your Honor's attention to what I think is—

The Court: (Interrupting): I don't want any discussion in front of the jury. You consent. That is all that is necessary.

Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers." [R. 228.]

(3) The Court said during the examination of the plaintiff's witness Bruce,

"The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book * * * Why should we take ten days to accomplish a thing that can be done in a couple of hours." [R. 251.]

(4) Upon the offer of Plaintiff's Exhibit 46 (containing the conclusions and opinions of an auditor who did not testify at the trial, an objection having been interposed to such opinions and conclusions upon the ground that if the witness were on the stand himself he wouldn't be permitted on objection to testify to such opinions and conclusions), the Court stated:

"The Court: I disagree with you on that * * * You mean to tell me that if that auditor told these defendants that he [would not be] permitted to say that he told them in person?"

To which counsel for appellant replied,

"Under the circumstances of this case I would take that position, your Honor."

The Court then stated,

"The Court: Then that is a matter that will have to go to the Circuit [Court], I disagree with you on it." [R. 616-617.]

(5) During the course of the examination of the plaintiff's witness Grace Benn, she testified that she thought "the gentleman I talked with that time was Mr. Ireland." Whereupon, the following occurred,

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so."

Thereupon, the Court directed each of the defendants singly to stand and inquired in each instance as to whether or not such defendant was the person with whom she talked. Upon receiving a negative answer, the following occurred,

"The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, your Honor.

The Court: Stand up again. Is that the man you talked to if you know? (The defendant Ireland arose as requested.)

The Witness: No, I don't think so." [R. 679-680.]

(6) During the course of the examination of plaintiff's witness Audra D. Jones, the trial court indulged in precisely the same practice as above indicated as occurring in paragraph (5) above, directing each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had the conversation with respect to which she testified. [R. 698.]

(7) Upon the introduction in evidence of Plaintiff's Exhibit 39, which recited details concerning financial

transactions of the Investment Finance with the Pierce Petroleum and Charles E. and Maryan A. Kenner, and subsequent to the admission in evidence of Plaintiff's Exhibit 216 (the Twombly statement referred to *supra* at page 91, in which he characterized one Kenner as an ex-convict and present resident of Folsom penitentiary), the Court volunteered the following statement:

“The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly.” [R. 818.]

The foregoing instances which are typical of other instances occurring throughout the trial, including the instances of misconduct referred to in Point VI, demonstrate clearly the Court's antagonistic attitude toward the defendants and their attorneys. Without apparent provocation, the Court treated a suggestion that the witness name the entire board of directors as an interruption of a sort which he would not tolerate, and when defense counsel sought to call the Court's attention “to what I think is—” the Court immediately interrupted to lecture the attorney, stating “I want the jury to get their evidence from the witnesses and not from the lawyers.”

On occasions the Court stated that he disagreed with defendants' counsel on points of law, and on one of these occasions stated that the matter would have to go to this Court because of such disagreement. (This statement could constitute nothing less than an assumption of defendant's guilt.)

In the case of each of the two witnesses who indicated that they had had conversations either with Mr. Ireland in one instance or with one of the defendants in another, the Court in an endeavor to have the particular defendant definitely identified, and thus confirm the testimony of the witness, compelled each defendant in turn to rise and confront the witness and finally pointed out the defendant Ireland and ordered him to stand again, and asked the witness who had mentioned his name whether he was the man with whom she had spoken.

None of these incidents could have been without their effect upon the jury and when their accumulative effect is considered, the conclusion is inevitable that the Court's misconduct prevented a fair trial.

As this Court has pointed out in *Williams v. United States* (C. C. A. 9), 93 Fed. (2d) 685, 687, a contention that the trial court has committed prejudicial misconduct is not affected by the fact that the trial judge is not intentionally unfair:

“* * * the harm done is not diminished where the Judge, by reason of unrestrained zeal, or through inadvertence, departs from ‘that attitude of disinterestedness which is the foundation of a fair and impartial trial.’”

The authorities cited in the foregoing Point XII, *supra*, pages 138-9 *et seq.*, which impose upon the trial judge the duty of complete disinterestedness as between the parties, are equally applicable in support of this Assignment.

POINT XIII.

Assignment of Error XX.

Both the Trial Court and Counsel for the Plaintiff Made Statements of Fact During the Course of Plaintiff's Closing Argument to the Jury, Concerning Which There Was No Evidence.

The Assignment of Error to which the discussion under this topic will be directed relates to both statements of the Court and counsel for the plaintiff that the defendants misrepresented to investors the manner in which the money of said investors would be invested, in the absence of any evidence of such a representation.

Said Assignment appears in full in the appendix hereto at page 76, and succeeding pages. The statements to which this Assignment of Error relate and the objections thereto appear in the Bill of Exceptions at pages 949 to 953 of the record.

Plaintiff's counsel argued that

"The investors * * * had the right to rely upon the fact that such representations and promises (the plan, agreement and declaration of trust) would be kept at all times." [R. 951.]

Plaintiff's counsel continued, telling the jury

"In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel, and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. *This was the object and purpose.*'

'Oh, no,' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. *These people were told*, or at least they were intended to be told, and for practical purposes they were told *through this plan and agreement that the money would be invested in certain ways.*

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(Statement read.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that

the text of that plan was available to all of them.
* * *

Mr. Irwin: * * * but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that.”
[R. 950-953.]

No representation was made to any person that the First Security would invest its funds only in loans secured by securities or properties approved as legal investments. No witness testified to having read the Plan and Agreement or that anyone ever represented to them that the First Security would only invest its funds in approved legal investments, nor was any letter or communication to that effect received in evidence.

The allusion of the Court was undoubtedly rooted in the testimony of the witness Tallamantes [R. 658]. This witness was asked,

“Q. Mrs. Tallamantes, as guardian of your son Jack Winston, did you have submitted to you a plan from the reorganization committee of the First Security Deposit Corporation inviting you to accept their plan and exchange your securities, which you then held in the—

Mr. Adams: Objected to as leading and suggestive. * * *

The Court: Well it is a preliminary question.

Q. In which there was submitted to you a plan by the reorganization committee of the First Security Deposit Corporation? Was there such a plan submitted to you * * *? A. I *think* there was a printed plan.

Q. Mrs. Tallamantes, I will ask you if you exchanged your securities * * * after there had been submitted to you the plan which I just asked you about? A. I think I did, I am a little hazy about it. I have seen the plan before that. * * *

Mr. Lawson: I thought counsel was going to follow that up and show us what the plan was. Now he says you have seen a plan. What is the plan? I don't know what he refers to.

The Court: You can't try his case. * * * He has asked for a plan and she said 'yes.' * * *.

Mr. Irwin: * * * might that question where she was asked about the plan, if she received the plan—might it be considered stricken? There are several objections that—might be interposed, that it calls for a conclusion * * * and not the best evidence * * *

The Court: When you said, 'the plan,' you are referring to any particular plan, or just to a plan of reorganization?

The Witness: Just a plan of reorganization.

The Court: The objection will be overruled. Exception." [R. 658-660.]

There is no evidence that the plan was ever circulated. The only evidence in the record is Exhibit 131, a brochure inviting investors to deposit their securities, but this exhibit contains no representations whatsoever concerning the nature and character of the proposed business pur-

poses of the First Security being to loan money only on legal investments. (*Supra*, p. 67.)

The trial court's refusal to restrain the prosecutor's argument in this regard and unwarranted confirmation thereof constituted prejudicial error.

Waldron v. Waldron, 156 U. S. 360, 380; 39 L. Ed. 453, 458, *supra*, p. 125.

Panama Electric Co. v. Moyers (C. C. A. 5), 259 Fed. 219, 220;

Gee v. Fong Poy, 88 Cal. App. 640-647;

Davis v. Pezel, 131 Cal. App. 46, 50-54 (Opinion by Justice Stephens).

POINT XIV.

Assignments of Error XXIII and XXIV.

The Trial Court Erred in Sustaining Objections of the Plaintiff to Certain Questions Propounded on Cross-Examination to Certain of Plaintiff's Witnesses Concerning Their Activities in Ascertaining the Market Price of Securities of the First Security and Their Knowledge as to the Market Price.

Assignments XXIII and XXIV are respectively printed in full in the appendix hereto at pages 80 and 84.

The rulings to which these assignments relate appear in the Bill of Exceptions at pages 456-460, and 437 of the record.

These assignments relate to the cross-examination of plaintiff's investor-witness Wright and her banker-agent Richmond.

Upon the identification of Exhibit 144 by the witness Wright as one received by her, the same was received in evidence. This letter recited, "What is the present market value of my First Security Deposit Corporation bonds? Is it possible for me to now realize immediate cash and suffer no severe loss?" Also, this witness identified Exhibit 145 as a letter received by her. This letter recited, "We now have available funds with which to purchase First Security Deposit Corporation bonds, and for limited period will pay best market price available for any who desire or need money at this time * * *;" The witness, in reply, wrote the Investment Finance Company, "Will you kindly advise me what the best cash market price is for this stock at the present time." She testified she received a reply reciting, "Please be advised that we can enable you to procure the sum of \$619.94" for her securities. Plaintiff's Exhibit 152 to the witness recites, "Replying to your letter of August 6, 1938 regarding securities of the First Security Deposit Corporation * * * we can obtain for you total of \$662.65 * * *" The witness testified she was the owner of certain preferred stock and a bond of the face value of \$854.20 of the First Security, and identified Plaintiff's Exhibits 144-152, respectively, as letters which were received by her from the Investment Finance or written by her to the Investment Finance [R. 414, 416, 419, 427, 430, 441, 445-455].

Plaintiff stated with respect to the offer of these letters that they were "offered to show that this course of relationship had been established between the company and the witness * * * and * * * offers were made from time to time of varied amounts for her stock and

certificates"; also, that the purpose was "to show that the statements made to the witness were false" [R. 443, 457].

On cross-examination, her attention was directed to Plaintiff's Exhibit 145 which recited that the First Security had funds available and would "for a limited period * * * pay the best cash market price available," and also asked if after the receipt of that letter if she made "any effort to determine what was the market price of those securities," to which question the witness answered, "I believe not." She was then asked:

"Q. Did you question Mr. Richmond with reference as to that matter of market price?"

Objection was sustained on the ground that it was not proper cross-examination, and an exception noted [R. 456-457].

The witness testified on direct examination that in response to Plaintiff's Exhibit 152, reciting, "Replying to your letter of August 6, 1938 regarding securities * * * we can obtain for you a total of \$662.65 * * *," she sold her securities to the Investment Finance for that amount [R. 453-454]. On cross-examination, her attention was called to this exhibit and she was asked: "Now, at that time did you have any information or independent knowledge of your own as to the market price of those securities?" An objection was sustained on the ground that it was improper cross-examination and an exception noted [R. 459].

The witness Richmond, on direct examination, testified he had occasion to represent the witness Wright with respect to her securities in the First Security and wrote

several letters on her behalf; and that he was a banker. He testified that he wrote to the First Security inquiring if she should sell the securities on the market at the present time, and "Can you tell us about what she should receive for them"; that he received a reply [Exhibit 155] from the First Security reciting, "We understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock." [R. 433-435, 869-870.]

On cross-examination, the witness Richmond testified he was acting for Mrs. Wright in connection with the matter, in a sense was her financial adviser, talked to her about the transaction, and when asked if he had made any independent investigation, answered, "I wrote several letters to California banks, to Los Angeles banks." This witness was then asked:

"Q. Inquiring, I presume, as to the value? A. As to the market; yes.

Q. Did you get some replies on that? A. I did."

The witness was then asked successively as to what information he received from the banks, if he advised Mrs. Wright with reference to the sale of her securities after receiving such information, and whether he gave her any advice with reference to the contents of the letter, Plaintiff's Exhibit 155. None of these questions was permitted to be answered, objections of the plaintiff thereto on the ground that they were not proper cross-exam-

ination, were sustained. To these rulings of the Court the defendants noted an exception [R. 435-439].

It is the contention of the appellant that the trial court erroneously restricted cross-examination upon a vital issue in the case. The very basis upon which this testimony and correspondence was offered justified the cross-examination. It is the contention of the appellant that the recitals in the correspondence as to offering "the best cash market price" were not false, but true. The witnesses sought from the company itself offers for the purchase of the securities and information as to the then existing market on these securities. They testified that ultimately an offer was accepted and the securities sold after efforts had been made to ascertain from independent sources knowledge as to the market price of the securities. Under these circumstances, the activities of the witnesses to learn what the market price was and their knowledge in that regard was legitimate cross-examination.

It is no answer to a refusal to permit a full cross-examination that the party against whom the witness was called to testify might have made him his own witness and then have propounded to him the questions to which he was entitled to answers upon the cross-examination. No one is required to make his adversary's witness his own to explain or fill up a transaction partially explained already.

Nor is it any answer to the refusal to permit a cross-examination that it would develop an affirmative defense.

If a witness, upon direct examination, is led to disclose a part of a transaction, the whole of which constitutes an affirmative defense, that fact does not deprive the defendant of his right to prove the entire transaction by the same witness upon his cross-examination.

Answers to the questions on cross-examination could have disproved the assertion that the representations as to market prices were false and proved that the witness was not defrauded, because she received the market price or better for her securities.

Any questions which fill up omissions, whether designed or accidental, are legitimate and proper on cross-examination. When the answers are given, the nature and extent of the transaction become known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent.

Under the authorities, the foregoing cross-examination should have been permitted.

Alford v. U. S., 282 U. S. 628, 75 L. Ed. 624;

Heard v. U. S. (C. C. A. 8), 255 Fed. 829, 832;

Cossack v. U. S. (C. C. A. 9), 63 Fed. (2d) 511, 516;

Resurrection Gold Min. Co v. Fortune Gold Min. Co. (C. C. A. 8), 129 Fed. 668, 675-678;

Minner v. U. S. (C. C. A. 10), 57 Fed. (2d) 506, 512.

POINT XV.

Assignments of Error XXXIV to XXXIX, Inclusive.

The Trial Court Erred in Overruling the Objections of Defendant to Testimony of Investments or Transactions by Investment Finance Co. Entirely Outside the Issues Presented by the Indictment, and in Denying Motions to Strike Such Testimony.

Assignments XXXIV to XXXIX are printed in full in the appendix hereto at pages 86 to 96.

These various assignments all relate to investments or transactions by Investment Finance Co. and present the same legal question of the admissibility of this type of evidence.

The ground of objection in each instance was that the particular investment criticized was not within the issues presented by the indictment which charged a completed offense of advancing of money or property to the Investment Finance Company; that it had no evidentiary value as to the scheme charged and related to a collateral, separate, distinct and isolated venture.

The transactions involved in the assignments are briefly set out in the discussion of facts, *supra*, pp. 29-32. They are the following:

- (1) Transactions between Investment Finance and Pierce Petroleum Corporation [R. 604, 611, 802-807, 817-818, 916 and 922];
- (2) Investments of Investment Finance in stock of Pacific Brick Company [R. 822, 856 *et seq.*, 920 and 922];

- (3) Loan of money by Investment Finance to Bond 17 Dog Food Company and purchase of stock of said company [R. 856 *et seq.*];
- (4) Purchase by Investment Finance of stock in American Building and Investment Company [R. 856 *et seq.*, 912 and 922];
- (5) Purchase by Investment Finance of stock in American National Bank of Santa Monica. [R. 374-375, 856, 910 and 922.]

The foregoing transactions are referred to as the basis of Assignments XXXIV to XXXVIII, respectively.

The indictment made no reference whatever to any of these transactions or to any loan of money or advance by Investment Finance. The charge was merely that the funds of First Security were loaned and diverted to defendants and to Investment Finance. [R. 7, 9.]

The ground upon which such evidence was received by the trial court, as he announced to the jury, was that it was material to that allegation of the indictment to the effect that "money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department." [R. 869.]

However, when the trial court struck this allegation from the indictment (Point I, *supra*, p. 53) he eliminated from the case the basis upon which these collateral transactions were admitted. It follows that the motions to strike such evidence should have been granted.

The only purpose actually served by such evidence was to furnish integument or indicia of verity to the unsworn charges contained in the Twombley statement which re-

ferred in detail to each of these very transactions, characterized them in detail as wanton breaches of trust which caused losses of several hundred thousand dollars to the investors—the entire responsibility for which the Twombly statement placed upon this appellant's shoulders. (Point VI, *supra*, p. 88.)

As we have seen, evidence of such collateral transactions is universally regarded as prejudicial.

Gold v. U. S. (C. C. A. 8), 36 Fed. (2d) 16, 33, *supra*, p. 121.

When as here such collateral transactions are shown—not for their effect as substantive evidence—but with the *inevitable result of documenting and reinforcing the accusations of the Twombly statement referring to such transactions and inculpating appellant* (*supra*, pp. 125-126), the inference of prejudice is inescapable.

Conclusion.

We regret that it has been necessary to extend this brief to such length, and will not attempt to recapitulate the many errors occurring at the trial.

We have shown the essentially cumulative effect of such errors culminating in a complete thwarting of the hearsay rule and in a direct violation of the constitutional right of the accused to be tried upon the charge presented by the grand jury—and none other.

The nature of the verdict itself is the clearest possible demonstration of the prejudicial impact upon the jury of this series of pyramided errors.

The jury's failure to convict any other officer or agent of the companies involved (other than defendant Twombly, the manager and author of the recital of accusations) shows that the full force of the trial court's erroneous rulings, instructions and comment, affecting this defendant and his counsel, was required to obtain a conviction.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon, and that under the state of the evidence, the cumulative effect of such erroneous rulings, instructions, and comment was to deny appellant the essential elements of a fair trial.

It is submitted that the judgment should be reversed.

Respectfully submitted,

OTTO CHRISTENSEN,

GORDON LAWSON,

Attorneys for Appellant J. Howard Edgerton.

APPENDIX.

[Assignment of Error XII; R. 1057-1060; Bill of Exceptions R. 1043-1045]:

Said District Court erred in denying the motion made by said defendant and appellant, after the jury had returned its verdict in the above entitled cause, finding him guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14, for judgment therein, for order arresting judgment on each of said counts, 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, of the Bill of Indictment.

The grounds of said motion were and the grounds of said error in denying said motion were and are:

1. That there has been no verdict against the defendant sufficient to sustain a judgment of conviction or a sentence thereon inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

2. That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the grand jury, said instruction being given by the court on said date in the following language:

“The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your con-

sideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

"You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the fourth line of said paragraph and page to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading as follows:

"That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

"No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

3. That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

"Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations",

for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranteed to him by Article V of the Amendments to the Constitution of the United States.

4. That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

[Assignment of Error XIII, R. 1060-1062; Bill of Exceptions, R. 1000, 1038-1040] :

Said District Court erred in giving the following instructions to the Jury:

“The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on age 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit:

‘theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.’

This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

The exceptions with respect to the foregoing instructions were as follows:

"Mr. Irwin: Then, Your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that Your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, Your Honor. I am quite in accord with Your Honor on the evidence, but the objection is made that the instruction should be that the whole allegation, since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand Your Honor's instruction was that simply

there is no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contains a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph.

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

[Assignment of Error I, R. 1051-1053; Bill of Exceptions, R. 927, 944-945]:

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count 1 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are:

1. That the evidence introduced does not tend to prove that the defendant was guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

2. That the evidence is insufficient to establish the essential elements of the crime charged in that,

(a) that there is no substantial evidence, or any evidence, to show that the defendant, J. Howard Edgerton, or any of the other defendants, did depress and/or cause to be depressed, the market price of the securities of the First Security Deposit Corporation, as charged in the indictment, and that as a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the particular value thereof, as charged in the indictment.

(b) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(c) That there is no substantial evidence, or any evidence to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method as charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or

pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

[Assignment of Error XXIX, R. 1140-1172; Bill of Exceptions, R. 751-771, 773-794 and 919]:

Said District Court erred in overruling the objections and exceptions of the defendants and each of them, respectively, to Plaintiff's Exhibit 216 and admitting the same in evidence, in denying the motion of the defendant Edgerton at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case to strike said exhibit. The plaintiff's witness Webster testified that on July 9, 1940 Plaintiff's Exhibit 216 came into his possession from the inspector in charge at San Francisco, California; that he had a conversation with the defendant Twombly with respect to Plaintiff's Exhibit 216 on July 9, 1940; that the defendant Twombly stated that he had prepared Plaintiff's Exhibit 216 from memory and handed the same to Inspector Van Meter and that the information contained in said exhibit came to his attention while he was associated with the First Security Deposit Corporation and the Investment Finance Company. Prior to the receipt of said Plaintiff's Exhibit 216 in evidence, the following proceedings were had in the absence of the jury:

“Mr. Campbell: * * * Now, this document is offered, you might say, upon two bases; First, as admission

against interest on the part of the Defendant Twombly, and, second, to show his joining that scheme, or enterprise, and as to him the existence of a scheme or enterprise."

* * * * *

"The Court: Now, I think it is only fair, in order that you may present the matter intelligently to the Court, to say that it involves, for the purpose of illustration (I have gone through it very hurriedly) all of the defendants and describes at some length, six pages, single spaced, the activities of this corporation. So that for the purpose of argument, you may consider that all of the defendants are involved."

"The Court: It is perfectly clear that such a document as this couldn't be considered to be properly introduced in evidence as against the other defendants, having been made subsequent to the termination of any possible connection which he had with the conspiracy, * * *"

"* * * it is conceded by the Government that Twombly severed his connection with both of these corporations about the 21st of December, 1938. Now, on July 9th, 1940, a year and a half after that, he made the statement to the postal inspector as to facts."

"Mr. Lawson: * * * when I thought or heard the rumor that there might be hostile defenses, I had Mr. Adams bring Mr. Twombly to my office. * * *

"and I canvassed this situation with him very carefully to find out—I am not saying that there are any hostile defenses—but to find out as to whether or not there were any hostile defenses.

We spent about three or three and a half hours in canvassing the case, and in all of its phases, and I was

assured from the beginning until the end that no statement had ever been made by Mr. Twombly, either in the form of a written statement, or any oral statement, that he had made any damaging or incriminating statements pertinent to my client, or any of the other defendants in the case. And I want to assure Your Honor that I went into that very thoroughly, and carefully.

I have no reason to believe that that statement contains anything contrary to the statements that were made to me at that time, and I can assure Your Honor that up until the time that this statement was presented I have always been of that mind."

"* * * if, assuming now that it does contain something contrary, as represented to me—it is a complete surprise. We have been collaborating all through the defense on the assumption that no statement has been made of a damaging character to my clients.

* * * * *

Mr. Irwin: Why did we make all this inquiry at the outset?

Well, it is no secret that there was a very severe disagreement between Mr. Twombly and the others, and the break was not a pleasant one. It happened in '38, and prior to the time of this indictment they weren't even on speaking terms, so as lawyers, being advised of that, we were interested in finding out what had gone before, and that is why we started looking for those statements that might be made by a person in the heat of passion or who doesn't reason."

"The Court: * * * If they want to know what it is right now, we will have to read it out loud * * *."

(Thereupon said Plaintiff's Exhibit 216 was read into the record in the absence of the jury.)

"Mr. Campbell: If Your Honor please, my position in this matter is * * * the narration of these events by Mr. Twombly constitutes admissions on his part, first, as to his knowledge of those events at the time they occurred, * * *, secondly, that he had knowledge of the existence of a scheme to defraud, * * * and that he knowingly joined in that scheme * * *

Mr. Lawson: What I would like to know, Your Honor, the question of knowledge wherein does that document show that Twombly had that knowledge during the existence of the conspiracy. I don't see it."

* * * * *

"Mr. Irwin: In the event Your Honor rules that this statement may be received as to the defendant Twombly only I believe that a motion for a severance should be made on the following grounds:

The Court: You make this motion now applicable to the time it is admitted?

Mr. Irwin: * * * I respectfully move * * * for a severance from this trial on the following grounds: That the evidence contained in Plaintiff's Exhibit 216, though it is competent or might be competent as against the defendant Twombly, is incompetent, hearsay, and prejudicial to the rights of the (other) defendants * * * and that its admission deprives the defendants of a fair and impartial trial to such an extent that no admonition to the jury would remove the prejudice created by the reception of that exhibit * * * in evidence. * * * When I was retained in the case, I was advised and told by my

clients that they didn't trust Mr. Twombly, that they didn't want to cooperate with him in connection with the trial because there had been considerable friction and considerable hard feelings, and that he had been discharged from the company under very unhappy circumstances, they didn't wish to collaborate or to cooperate, and to watch him That, in effect, was the admonition.

As we got into the investigation of this case, word was sent to Mr. Edgerton by mutual friends of Mr. Twombly, that his attorneys should certainly cooperate with him and that there was no hard feelings, what is gone is gone, and everybody was in the same boat, and that he wanted to get together. * * *

“* * * We understood that Twombly had been assisting the post office inspectors in the investigation of the case. * * * We understood that there was prejudice and hard feeling— * * * but what we wanted to know before we considered any collaboration and likewise whether or not we should consider a motion for severance which had to be supported by affidavits—was whether or not Mr. Twombly had made any written statement of any kind to the post office inspectors * * * which would implicate or involve or cast discredit and which might be admissible in evidence in this lawsuit.

* * * Mr. Adams told me, not once but on several occasions, that he had interrogated Mr. Twombly * * * and that Mr. Twombly had assured him that there wasn't any, and that he, Mr. Adams, * * * was satisfied that Twombly, in fact, had made no statement. Twombly told me he had made no statement as late as yesterday afternoon * * * He said 'You won't find a thing damaging

to your clients in that statement.' * * * If we had made a motion for a severance before the trial started, after the inquiry and the research we made, we would have had no grounds. We couldn't have made any affidavit * * * There was an antagonistic defense * * * there was nothing which would have justified a motion for severance before this jury was impanelled, we could have made no showing to the court."

* * * * *

"I believe it is very persuasive that this statement of itself indicates that the defenses, and that are now for the first time known to us, is clearly hostile and clearly antagonistic.

"Now, as to the prejudicial nature, may it please the Court, even though it is restricted as to the Defendant Twombly, I will ask Your Honor's consideration of this fact: Would Your Honor say that in our duty to our clients, that even though Your Honor restricts this statement to the Defendant Twombly, that we could go on and present the defense in this case, which would ignore, before the jury, the accusations and charges made by the defendant Twombly?

The question suggests its own answer.

For example, Your Honor, we would have the burden of showing that in the fore part of that statement, Mr. Twombly leaves out that Mr. Edgerton had nothing to do with it; that Haight and Trippet were the attorneys who organized that, and that H. F. Dunton, the man who outlined the plan, had just recently resigned as Deputy Building and Loan Commissioner.

We would have the burden of showing that Mr. Twombly initiated the Pierce Petroleum loans and initiated the dog food plan.

I say to Your Honor, as opposed to the question of the prejudicial nature, I think it suggests its own answer. * * * This matter before us, * * * isn't an admission; that is a complaint that this man initiated it. * * * Now it appears for the first time that is why we are here. * * * What it amounts to. * * * is a second indictment we have to meet. It includes charges, * * * that are not contained in this indictment."

"Mr. Lawson: Your Honor, might it be considered that the same motion that was stated by Mr. Irwin, that it may be made on and in behalf of the Defendants Edgerton and Ireland and on the grounds therein stated, that prejudice will result in the trial of Edgerton and Ireland, and of such character that no instruction or limitation by the Court as to proof will cure the prejudice; and as a result they will not have a fair and impartial trial.

The Court: It may be stipulated that the same motion may be deemed to be made as to those defendants.

Mr. Campbell: So stipulated.

* * * * *

Mr. Lawson: The vice in this situation is this: That the statement, as made by Mr. Twombly, is, in the form of an accusation, or a complaint against the defendants, and particularly as to the defendant Edgerton. Ninety per cent of that statement is a *stricture* against Edgerton in so many words; in so many words it says that he is

guilty of this, that, and the other thing, stating a long series of conclusions, not a statement of fact.

Presuming for the moment that up until the time of the trial that everything was done properly; that is, a proper course of conduct was taken by counsel in regard to the protecting of the right of the client, which I am satisfied was, and I might say, incidentally, there, that I am familiar with the rule that ordinarily a motion for severance is not granted. * * * I wouldn't make that motion unless * * * I had * * * strong reasons to support my application, otherwise, we would be merely making a frivolous motion."

"Here is the situation that we find ourselves in: As I stated to Your Honor yesterday, that having heard statements of a character that Twombly may have said something derogatory about the Defendant Edgerton, I believe I discussed this with Mr. Campbell and Mr. Campbell said in a jocular vein, said, 'Well, what we have on Twombly,' and so forth. I think that is a correct statement. I think in the same vein I asked him what it was, and he said, 'You will hear about that later.' "

* * * * *

"Mr. Lawson: I went into the matter first with Mr. Adams and discussed it with him, and then I suggested that Mr. Twombly come to my office, and Mr. Adams and Mr. Twombly came to my office * * * I took my gloves right off and put it in a very blunt form of question, and told him exactly what I had been informed, and that I wanted to know * * * if he had made (a) statement. * * * Now, Mr. Twombly, * * * I learned * * * during our discussion that evening, is not only a lawyer, but he is an accountant. * * *

He not only kept the books, but he made the audits. * * * Now, when we discussed it that evening, * * * after I was assured that * * * no damaging statement had been made, and that he would fully cooperate, I said, 'You are just the man to take care of that period, because of your particular knowledge and skill, and on all questions relating to that period we are going to look to you to take care of.' That was the understanding we had, and I relied upon it all through the preparation of the case and during the trial of the case.

* * * * *

The Court: Now, let me ask you just one question: Suppose that Mr. Twombly had said to you yesterday 'Gentlemen, whether you like it or not, I have made up my mind that I am going on the stand, and I am going to answer every question that anybody asks me about this matter;' would you be in any different position?

* * * * *

Mr. Irwin: * * * The defendant can take the stand and have the opportunity of cross-examination. It comes for the first time, and he puts in his direct testimony, and it must be evidence and not conclusions. You have an opportunity to object to every question as he goes along, and he is confined to legal competent evidence. Now, this statement contained all kinds of conclusions.

* * * If he took the stand he would not be able to state that Starr, Smale and Thomas violated their trust, the trust of those depositors, because that is hearsay, clearly as to him. There is nothing in the books. Plaintiff's counsel hasn't shown a thing that Starr, Smale and Thomas violated their duties, that they had been running

around indiscriminately getting the security holders signed up.

All that stuff that he refers to in '31, '32, and '33, the most damaging kind of things, Your Honor, which are the rankest hearsay on his part, because he doesn't come in until '34.

I think those are two points upon which Your Honor's hypothesis may be distinguished.

Again, in that connection, his manner on the stand, the usual instruction that the jury has, our cross-examination proving the falsity of his statements, providing we can, would be checked and counter checked by a restriction, so that we got only competent evidence; and that the full story would be there at one time instead of going in this way that the burden is upon the defendants of taking something, which is not admitted as against them, and cannot be received as against them, and refuting the whole thing in addition to what is in the indictment."

"The Court: * * * I have made up my mind that my ruling will be that there will be no severance * * * I shall be willing to receive and permit them to file * * . * any affidavits that they may want * * *.

Mr. Irwin: * * * Might I ask Your Honor whether this wouldn't eliminate unduly encumbering the record * * * if Mr. Lawson and I were permitted to be sworn * * * and then state that the statement given * * * is true in all respects, to the best of our knowledge, * * *. Therefore that that would be in effect our testimony without encumbering this record with affidavits?

The Court: I am perfectly willing to have you, in lieu of affidavits."

Thereupon, J. J. Irwin and Gordon Lawson having been first duly sworn were examined and testified as follows:

"The Court: Was the statement that you made this morning true as to the facts which you gave in connection with the motion for severance, Mr. Irwin?

Mr. Irwin: It was, Your Honor; in substance, each and every one of the facts related are my recollection.

The Court: So far as you know at the present time, there are no corrections or errors in that statement of facts?

Mr. Irwin: That is correct.

The Court: In so far as the statements purported to indicate any knowledge on your part or any contact on your part, was it true?

Mr. Lawson: True, Your Honor.

The Court: You have no correction to make?

Mr. Lawson: No corrections."

"Mr. Irwin: So it may be preserved, may it be stipulated that the motion has been made and that it is denied and exception is granted?

The Court: Yes.

Mr. Irwin: There is this other motion to-wit, the motion is now made, may it please the Court, on behalf of the defendants Starr, Smale and Thomas, individually, for themselves, that this Honorable Court withdraw a juror and thereupon declare a mistrial because of the introduction and the receipt of Exhibit 216? That is to complete the transaction.

The Court: The same motion as to your client?

Mr. Lawson: Yes, on behalf of the defendants Edger-ton and Ireland.

The Court: The motion will be denied, exception.

Mr. Irwin: May it be considered, Your Honor, that these motions were made in a proper sequence following the receipt of 216, and I think this point should be raised, Your Honor.

The Court: Just a minute. May it be so stipulated that the motions may be deemed to be made in their proper sequence?

Mr. Campbell: So stipulated.

Mr. Irwin: Your Honor, in this connection, with reference to 216, there has never been any formal objection stated on behalf of the defendants; in other words, Your Honor was good enough to consider a motion for severance on the assumption that it was in evidence, so whenever Your Honor thinks it is appropriate, and while the jury isn't present, I think the objection should be made.

The Court: Make it right now because I am going to bring the jury down.

* * * * *

Mr. Irwin: Your Honor, objection is made to the re-ception of Exhibit 216 for identification, specifically and individually, on behalf of the defendants Starr, Thomas and Smale on the grounds that although the offer is lim-it-ed to the defendant Twombly and the evidentiary matter contained in that exhibit is incompetent as against the defendants Starr, Smale and Thomas, and cannot be received against them, that nevertheless its being received

only towards Twombly, that the nature of the exhibit is so prejudicial to the rights of the several defendants that I have mentioned and it deprives them of a fair and impartial trial to such an extent that no admonition to the jury can or would remove the prejudice created by the reception of that document.

I think I have covered the grounds. Thank you, Your Honor.

Mr. Lawson: I want to join in that objection, Your Honor, and add to it, on behalf of the defendants Ireland and Edgerton, that there is no evidence in the case that connects up either of the defendants Edgerton or Ireland with the scheme or conspiracy, as alleged in the indictment, and that this is an attempt by indirection to make a connection between those defendants with the scheme and conspiracy as alleged.

* * * * *

Mr. Irwin: Your Honor, I think I should add that the statement in addition is prejudicial because it contains matters which are not contained in the issues of the indictment, and that it includes matters which are clearly only hearsay as to the defendant Twombly and could not be binding on the defendant I represent.

Mr. Lawson: I wish to adopt that and add to it that it touches on matters that have already been limited to a point, that this statement goes beyond that limitation. As a matter of fact, that it admits evidence that the Court has already ruled to be objectionable.

The Court: The objection will be overruled.

The rule of the Court is that that limitation does not apply to the offer, as limited, or are the objections sound

under the offer as limited, to not only the defendant Twombly but as to the intent of the defendant Twombly." (To which ruling of the court, an exception was duly taken.)

(Thereupon said statement was received in evidence and marked Plaintiff's Exhibit 216.)

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. * * *

Now I might think that John Doe and Richard Roe and Bill Smith and Mary Grab were the dirtiest bunch of crooks in the world, and I might take an action predicated upon that feeling. It might not be true at all. And what I thought about these people might be no evidence at all as to what they actually were, or as to what I thought had occurred.

We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, as against any defendant in this court room, including the Defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that.

To illustrate: Whether or not those things were true or false would be immaterial so long as the Defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances."

Thereupon said Exhibit 216 was read to the jury. Said exhibit is in words and figures following:

“(In ink) Prepared by Mr. Twombly.

The first Security Deposit Corporation was organized in 1931 for the purpose of reorganizing the Railway Mutual Building and Loan Association. The latter company was rendered non-operative because of the building and loan situation existing at that time, together with the check on operations because of the more stringent building and loan laws as compared with the regulation of general corporations.

To effect the transfer of securities and assets of the Railway Mutual Building and Loan Association it was necessary to procure the consents of its security holders. For this purpose an extremely complicated Plan and Agreement was adopted whereby the said holders were to deposit their securities and receive in exchange therefor interim certificates. R. W. Starr, E. C. Thomas and L. S. Edwards were appointed as trustees and managers under the said plan. High pressure salesmen were then sent out to contact the securities holders for the purpose of procuring their consents to the proposed plan of reorganization. These holders were apparently promised and told anything and everything in order to obtain their consents. Those who consented easily got either what they were supposed to be entitled to in securities of the new company, or less. Those who were not so easily sold on the idea in many instances were given preferential securities. No plan of exchange of securities was consistently followed. The so-called Plan and Agreement was so long and so complicated that it was apparently un-

derstood by nobody, however, there is no doubt but that the trustees were extremely derelict in their duties.

After the expenditure of approximately \$60,000 of those investors' money, it was then determined that there was no law which would permit of the reorganization. Lobbyists were then put to work to procure the passing of enabling legislation by the Legislature of the State of California. This was ultimately accomplished. Until approximately this time the affairs had been dominated and controlled by R. W. Starr, E. C. Thomas and J. L. Smale, and at this time J. H. Edgerton, an attorney, was added. It was still impossible to complete the reorganization because an insufficient number of consents had been obtained. To put the deal over a deal was made with Charles E. Kenner (a graduate of Sing Sing prison for the misuse of other people's money and now in Folsom penitentiary for the same reason). Kenner was to obtain sufficient additional securities or consents to make the plan operative and was to receive approximately \$40,000.00 in good first trust deeds for which he had the option of trading Railway Mutual Building and Loan Securities or securities in the First Security Deposit Corporation face value for face value. At this time these securities were quoted at about 20 cents on the dollar. The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and these they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted.

The reorganization was finally completed with approximately 20% of the investors staying in the Railway Mutual Building and Loan Association and about 80% high pressured into the First Security Deposit Corporation. The basis of the financial structure of the First Security Deposit Corporation was three classes of stock, and a great many varieties of collateral trust bonds. The First Security was to take 80% of Railway Mutual Building and Loan Association assets and liabilities and the balance was to remain. The same amount of securities in the Railway Mutual Building and Loan Association were to be turned back to them for cancellation. The Building and Loan Commissioner of the State of California designated the segregation of assets, and the best 20% remained in the Railway.

The First Security Deposit Corporation issued bonds in the sum of approximately \$1,300,000, preferred stock (A and B) in the amount of \$274,460, and common stock in the amount of \$4,488. Of the latter stock Starr, Thomas and Smale controlled about \$3,350, and this was the voting stock. In this way control was carried on and \$3,350 controlled this \$1,600,000 corporation for a period of two years. At this time, inasmuch as no dividends had been paid on the preferred stock, the preferred stock became the sole voting stock. However, this made no difference as at the time of issuance of the securities every investor was requested to execute a signature card. Some refused but the huge majority complied. On the reverse side of this signature card there was printed the following, "Proxy, I hereby appoint R. W. Starr, J. H. Smale, and E. C. Thomas, or any two of them acting in accord as my proxy to vote my shares at all meetings at which I am not present or have a subsequent proxy, for a

period of seven years unless revoked earlier. No statement or condition, verbal or written, other than herein provided shall be binding on the corporation."

No notice of any stockholder's meeting was ever given other than by publication in The Daily Journal, a Los Angeles legal newspaper, and which is not read by the public at large. Therefore, for all practical purposes, the control of the corporation remained unchanged.

The assets in the segregation were finally transferred effective as of January 1, 1934. The Board of Directors of the First Security Deposit Corporation consisted of R. W. Starr, E. C. Thomas, W. S. Brayton, A. R. Ireland, C. E. Perkins and Wm. Leffert and C. H. Berry. Berry and Perkins have subsequently resigned and Brayton has died. J. H. Edgerton was attorney. J. L. Smale remained in the Railway Mutual Building and Loan Association as president.

About this time a first trust deed held on the Reed Bros. Mortuary for approximately \$42,000 was in considerable trouble. Mr. Edgerton formed the R. F. D. Discount Co. (at first a partnership and later a corporation) which was conducted and operated in his office. The interested parties were Edgerton, Starr, Smale, Thomas, Berry, Leffert, Brayton, Ireland, also Aaron Johnson and Florence Anderson who were with the Railway Mutual Building and Loan Association. The R. F. D. Discount Company purported to act as go between in the settlement of this trust deed. Reed Brothers paid \$22,000 in cash into an escrow at the Title Insurance and Trust Company, \$17,800 of this sum was paid to the First Security Deposit Corporation in settlement of all liability under the trust deed. Edgerton retained \$1,000 as attor-

ney's fee. R. F. D. Discount Company got \$3,200 for which each of the ten persons received a \$320 interest in the R. F. D. Discount Company. The only item showing on the records of the First Security Deposit Corporation is the receipt of the \$17,800. No attorney's fee to Edgerton is shown and not approval therefor was ever given by the First Security Deposit Corporation officially.

Early in 1934, a deal was made with Battell-Dwyer Company (a stock and bond concern). They were to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid 5 points above what they paid upon delivery of the securities to the First Security Deposit Corporation. On many occasions it appeared they took more than five points, but nothing was done about it. Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was procured free on the representation that it was without value.

Included in the assets of the First Security Deposit Corporation was a house on Stearne Drive, Los Angeles, California, and was carried on its books at approximately \$7,500. Edgerton, in 1934, decided to buy the house. The First Security Deposit Corporation had acquired some of its own bonds, so Edgerton bought \$7,155.06 face value. These had been bought for \$2,206.64. Edgerton had these bonds deposited in an escrow where payment was to be made. In the same escrow, he had the papers transferring ownership of the real property deposited. In the escrow he borrowed approximately \$2,300 on the real property from the State Mutual Building and

Loan Association. With this money he paid for the bonds and the costs of the escrow. The bonds were then returned out of the escrow to the First Security Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in payment of the property. The balance of \$2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in full payment for the bonds, or a cash loss on the bond deal alone of \$185.35. Approximately one year later, the First Security Deposit Corporation took back another piece of property located at 239 21st Place, Santa Monica, California. Edgerton bought this property. He sold the Stearne Drive house for about \$4,500.00 cash. From Battelly-Dwyer and other sources, he purchased bonds of the First Security Deposit Corporation of a face value of \$11,750. The price paid was between 30 and 40 cents on the dollar. These bonds, together with the cash sum of \$110.44 was given by Edgerton to the First Security Deposit Corporation for the property. This resulted in a book loss on the property of \$372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about \$7,000.00.

In the summer of 1934, auditors in checking bond purchases by the First Security Deposit Corporation from Battelly-Dwyer Company discovered that on approximately 1,000 shares of First Security Deposit Corporation preferred stock \$1.00 per share was added to the price charged for bonds and paid by the First Security Deposit Corporation, and the stock was delivered to Edgerton and Starr for the R. F. D. Discount Company. Battelly-Dwyer Company refunded this money to the First Security Deposit Corporation and rearranged their deal with

the R. F. D. Discount Company. R. F. D. Discount Company had now become the medium for acquiring all the stock it could of First Security Deposit Corporation. Practically its entire working capital consisted of the \$32,000 hereinbefore described. This stock carried voting control, and all of it would become very valuable if the bond holders could be chased out of the picture cheaply enough.

About this time Kenner decided he could use the Railway Mutual Building and Loan Association in some of his manipulations. He approached Edgerton for the purpose of purchasing about \$19,000 face value of securities which the First Security Deposit Corporation owned in the Railway Mutual Building and Loan Association and had much to do with its control. It was arranged that the R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to the First Security for its securities in the Railway. This was done, although all holders of First Security Deposit Corporation stock were being assured by Battelle-Dwyer Company that it was worthless. Kenner then paid \$1,000 to R. F. D. Discount Company for an option to purchase the Railway securities. He didn't take up the option and forfeited his money. However, the Railway (with some assistance through the use of First Security money in purchase of securities to get the necessary consents) subsequently became federalized and these securities were redeemable for 100 cents on the dollar. Sometime later P. S. Noon needed money in mining operations. He approached Edgerton and it looked like a very lucrative deal to him. He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money for him. It appears that they borrowed about

\$15,000 worth of the Railway Mutual Building and Loan Association securities from the R. F. D. Discount Company and hypothecated their stock in the R. F. D. Discount Company to the R. F. D. Discount Company for the return thereof. Edgerton then hypothecated the Railway Building and Loan Association securities to F. E. Jones borrowing money from him which was loaned to Noon. The mining deal failed to come up to Noon's expectations and he is now endeavoring to pay off. Another ramification will be described later. Noon is apparently 100% honest, being a court reporter of excellent reputation.

In October, 1934, Edgerton had caused the formation of the State Investors Corporation, consisting of his father and one J. L. McSwiggen (a former employee of the First Security Deposit Corporation), State Investors Corporation was entirely devoid of any financial backing, yet in October, 1934, the Board of Directors of the First Security Deposit Corporation agreed to enter into a contract whereby it would sell \$187,020.93 book value of designated real property to the State Investors Corporation. The State Investors Corporation took immediate possession of the properties and was entitled to receive all rents. It had no obligation to make any payments, other than for taxes, for one year. It could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property, or could pay in cash at the rate of 40 cents in cash for each \$1.00 of book value. This arrangement was so entirely bad and unsatisfactory to the First Security Deposit Corporation that the contract was cancelled by mutual consent after about six months.

Dar Knowled, son-in-law of J. L. Smale, purchased a property from the First Security Deposit Corporation for about \$1,000 cash. He immediately borrowed an amount from the State Mutual Building and Loan Association sufficient to return the \$1,000 and buy furnishings for the house. It is believed that the property was subsequently sold at a handsome profit. Some such deal was also made with another relative (father or father-in-law) of J. L. Smale.

Through the efforts of Battelle-Dwyer Company and others approximately \$700,000 worth (face value) of bonds of the First Security Deposit Corporation were acquired and retired, up to the time Battelle-Dwyer Company became more or less inactive in the field. It was an extremely lucrative deal to them, a great deal of the bonds having been acquired through the trading of other securities therefor.

In 1935, the Investment Finance Company was organized and operated in conjunction and out of the same office with the First Security Deposit Corporation. Its original capitalization was exceedingly small, the First Security Deposit Corporation being the main holder of stock with the purchase of \$1,000. This it still holds. Subsequently all of the R. F. D. Discount Company holdings were sold to the Investment Finance Company and the proceeds distributed and the corporation was dissolved. This included the Railway Mutual Building and Loan Association securities which had been pledged. In order to cover this item these same individuals hypothecated their holdings in the Investment Finance Company (which they had acquired by purchasing stock in the Investment Finance Company, with the money received from the sale

of R. F. D. Discount Company assets to the Investment Finance Company). Stock was put up as follows: Starr 2500 dollars, Mary Starr Brayton (widow of W. S Brayton) 5000 dollars, Ireland 5000 dollars, Edgerton 1666 dollars, Anderson 1200 dollars, Thomas 1160 dollars. Some of the R. F. D. Discount Company holders did not put their entire receipts into the Investment Finance Company.

The Investment Finance Company has financed its operations by borrowing from the First Security Deposit Corporation. At the present time Investment Finance Company owes First Security Deposit Corporation about \$275,000 which it has borrowed on an open account not even giving notes therefor.

The Investment Finance Company has engaged in many activities most of which have resulted in frozen assets. A loss of about \$25,000 was had on an oil well deal with Kenner. This deal was consummated by Edgerton. Considerable losses were obtained in the automobile business, one deal being the backing of Kenner. Deals with Kenner have cost about \$75,000.

The Investment Finance Company took over the purchase of First Security Deposit Corporation securities. It borrowed money from First Security Deposit Corporation and purchases its securities from its investors. The bonds it purchased below face value are either still held or have been turned over to the First Security Deposit Corporation at full value (including accrued interest). The stock it purchased was kept and held for purposes of control of the First Security Deposit Corporation. Letters were written to First Security Deposit Corporation investors telling them First Security Deposit Corporation

was in liquidation, and so forth. One C. L. Cronk was employed for this purpose. This was over the opposition of at least one director who stated he believed the writing of such letters was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. No attention was paid to this except that a committee was appointed to handle the matter and consisted of Starr, Thomas and Cronk. Later Edgerton superseded Thomas. Edgerton finally decided that no letters should be written out of the State of California. The Investment Finance Company through this procedure, and through the R. F. D. Discount Company purchase, has acquired about \$100,000 par value of First Security Deposit Corporation preferred stock and about three-fourths of the common stock.

Edgerton became interested in the Western Brick Company and caused the Investment Finance Company to invest about \$30,000 therein, besides loans by the American National Bank of Santa Monica. He, Starr and Thomas, acquired some free stock for themselves in the transaction. This company was revamped and the assets were sold to the Pacific Brick Company, thereby freezing out minority stockholders in the Western Brick Company. The company has operated at a loss since acquisition.

Edgerton, with Battelle-Dwyer Company, then presented a deal involving the American National Bank of Santa Monica to the Investment Finance Company. The bank had a capitalization of \$100,000 and a purported surplus of about \$22,000. Assets listed consisted partially of a building valued at \$84,000 and furniture and fixtures valued at \$17,000, both actually worth not more than \$50,000, giving a real approximate value of \$71.00 per

share. The Investment Finance Company purchased 100 shares at \$150.00 per share and loaned Battelle-Dwyer Company \$150.00 per share on 167 additional shares. The balance necessary to constitute control of the bank was sold to clients of Battelle-Dwyer Company after a voting trust had been formed wherein Edgerton and Dwyer were voting trustees. Battelle-Dwyer Company was unable to pay the loan, going out of business, and the Investment Finance took over the stock. The Investment Finance Company now has about \$54,000 invested in stock of the bank, and it does not seem possible that any dividends can be paid for several years. One director of the Investment Finance Company went on the bank board and stayed about two months. He claimed something was wrong somewhere in the set-up, including the management of the bank, and should be thoroughly gone over. Edgerton and Starr decided Starr should go on in the fault finder's place to represent the Investment Finance Company on the bank board. Six months later, after much unnecessary money had been spent by the bank, the management of the bank was changed. About two years later the bank examiners found that the building had been written up from \$1.00 to the value shown on the balance sheet and cash dividends paid on the surplus accruing from the write-up. This happened shortly prior to the advent of the Investment Finance Company into the picture. It is now necessary that additional funds be put into the bank to rearrange the capital structure to clear up the capital impairment that exists. Edgerton and Starr are now directors on the bank board.

In connection with the bank, another corporation was formed, the American Building and Investment Com-

pany. This operates in conjunction with the bank being used as a spring board. Investment Finance Company has invested about \$20,000 in this venture which has not as yet shown any huge profits.

One W. P. Bonds next came along and sold Arnold Eddy (associated with Edgerton in the California Federal Savings and Loan Association) and Edgerton on the dog food business. The Investment Finance Company decided to go for the deal. When building was discussed only one individual wanted to build on a strict contract basis. Instead it was a cost plus job and cost many times the original contemplated price. Approximately \$60,000 has been invested in this venture.

None of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between \$300,000-\$400,000.

Edgerton is attorney for all of these companies and actually runs them. He is manager of the First Security Deposit Corporation, Investment Finance Company and the California Federal Savings and Loan Association. Attorneys fees paid by the Investment Finance Company and the First Security Deposit Corporation (prior to the time Edgerton became manager) for the period January 1, 1934, to April 1, 1938, were about \$15,000. \$5,000 would be excessive.

In order to qualify Miller, Hollowell, Starr and Edgerton as directors of the American National Bank, it was necessary that they have stock in the par value \$1,000 and execute affidavits that this stock belonged to them

free and clear and was unhypothecated in any way. The Investment Finance Company delivered to each of them the necessary stock and took from them promissory notes in the sum of \$1,500 (the amount paid for it by the Investment Finance Company). There was no intent on the part of any of them to pay for the stock. Edgerton's and Starr's stock is held in the office of the Investment Finance Company assigned in blank by virtue of a separated assignment attached to the stock for easy removal in case of inspection. The same is true of Miller and Hollowell except that it is held in a safe deposit box in the bank. There is a gentlemen's agreement that no effort will be made to collect the notes. This is merely a subterfuge to get around the requirements of the government.' "

The grounds of said error in overruling said objections of the defendant Edgerton to Plaintiff's Exhibit 216 and in denying his motion to strike said exhibit were and are the grounds of his objections hereinabove stated.

[Assignment of Error XXV, R. 1091-1098; Bill of Exceptions, R. 615-617, 619-627, 916 and 921-922] :

XXV.

Said District Court erred in admitting into evidence over the objections and exceptions of the defendant Plaintiff's Exhibit 46 in full for the purpose of showing that the information contained in said exhibit was communicated "To certain individuals" in order that the jury "may use that as an element to determine the intent with which the various acts were done" by the various defendants, and in denying the motion of the defendants made at the close of the plaintiff's case and at the close of all of the

evidence in the case, to strike said exhibit and exclude the same from consideration by the jury; and in overruling defendant's objections to and in denying his motion to exclude that portion of said Exhibit 46, which contains the comments, opinions and conclusions of the author of said exhibit, as distinguished from the audit contained therein, from the consideration of the jury.

Said Exhibit 46 consists of a letter and an accompanying report by certified public accountant under date of February 25, 1939, to the Investment Finance Company respecting the examination of the accounts of said company, as of December 31, 1938; said report recites as follows:

“Comments.

Cash.

Cash on hand was counted and reconciled to December 31, 1938, and the bank accounts were confirmed by letter and found in order.

Accounts Receivable.

The accounts receivable are presented in detail in Schedule I and total \$2,038.69, consisting largely of insurance premiums uncollected by the Wilshire Insurance Agency.

Contracts Receivable.

Contracts receivable as per Schedule II are automobile sales contracts. They are presented on Exhibit A at book value, although more than 50% of the dollar balance at December 31, 1938 have been pledged with the American National Bank of Santa Monica as security for a loan which at that date amounted to \$8,700.00.

Notes and Loans Receivable.

Of a total of \$48,413.27 in notes and loans listed in Schedule III, \$37,400.00 is unsecured. In fact, the largest single note of \$16,650.00 is signed by Battelle-Dwyer & Co., which, it is understood is no longer in existence.

Investments.

Schedule IV is a presentation of the securities into which the company has put most of its funds, obviously more for purposes of control of the various companies concerned than for income from the securities themselves. Most of the investments have been in the common stocks (or voting stocks) of the various companies upon which little or no dividend income has yet been realized.

Pledge Agreement—California Federal Savings & Loan Securities

The item of securities owned in the California Federal Savings and Loan Association which is carried at \$15,000.00 is subject to a pledge agreement of the liquidated Consolidated Investors Corp. with one F. E. Jones, and is secured by the deposit with this company of the following shares of stock in this company.

W. S. Brayton (has not been assigned to Investment Finance)	5,000 shares
R. W. Starr	2,500 shares
A. R. Ireland	5,000 shares
J. H. Edgerton	1,666 shares
F. A. Anderson	1,200 shares
Ed C. Thomas	1,160 shares
<hr/>	
Total shares Hypothecated	16,526 shares

The above listed individuals are all the endorsers of the said pledge agreement. This agreement apparently was originally intended to terminate on July 23, 1939, but it should be noted that there was a typographical error on the agreement itself so that it actually reads July 23, 1936.

Deed of Trust—Pacific Brick Co.

Interest has been accrued to August 1, 1938 on a first trust deed on all the property of the Pacific Brick Co., which was the approximate date of acquisition by this company.

Real Estate.

The real estate shown on Exhibit A at \$5,608.19 consists of a house built for resale. It is mortgaged to the extent of \$3,673.18 as shown under First Trust Deed Payable.

Accounts Payable—First Security
Deposit Corporation

This account has gradually been built up to its present figure over the past three years by numerous advances from First Security Deposit Corporation on open account without security. Interest has been paid at the rate of 3 per cent per annum, but this interest has been paid in bonds of the First Security Deposit Corporation at face value, thus reducing the effective interest rate because all such bonds purchased by this company have been acquired at a substantial discount.

Inter-locking Schedules.

Schedules V and VI, respectively, show the inter-locking stockholders and directors of the eight related companies. Schedule V is presented on transparent paper so

that the two charts may be considered either jointly or separately. Only those stockholders or directors are included on the charts who are connected with two or more of the companies involved.

Schedule VII presents inter-company financial *objections* with amounts. The broken lines indicate unsecured obligations and the solid lines indicate obligations which are either fully or partially secured.

General.

With reference to the 'Noon deal' mentioned on page 2 of comments, no attempt was made to verify the present status of the note or pledge agreement. It would appear to be a doubtful asset at best. It is also possible that the manner of showing the account as Savings and Loan is questionable since probably all the Investment Finance obtained was an agreement or contract rather than the shares themselves.

Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlocked as to appear identical in effect (see Schedules V, VI and VII); (2) profits which might accrue to the First Security Deposit Corporation would be

diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.

These questions, then, should be answered, and do they constitute fraud:

(a) The purchase of First Security Deposit Corporation bonds at a discount, and the resale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to others?

(b) Taking over the Wilshire Insurance Agency, and diverting commissions formerly earned by the First Security Deposit into the income of the Investment Finance?

In addition to these questions there might be raised the more general one of whether, since in acquiring funds from Security—which funds were in most instances profitably invested—the re-investment in such mismanaged enterprises as Bonds-17, for example, might on its face be construed to be fraud and mismanagement regardless of the answers to the hypothetical questions propounded above.

It would also appear that perhaps in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact, and still further, might bring the company under the S.E.C. because they were sent through the mails out of the state.

In summarizing, it would appear that it might be difficult to justify legally, the existence of the company in

any particular, as it is now operating. As your auditor, I wish merely to direct the above matters to your attention, realizing that you have no doubt considered them before."

The grounds of said objections and motions to exclude were:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters in agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant; for the reasons,

(1) The same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues, raised by the indictment;

(2) That there is no evidence that the defendant Edger-ton had knowledge of said report, and that portions of Exhibit 46, as distinguished from the audit itself, are mere comments, opinions and conclusions by the author of said report, and hearsay.

5. During the course of the reading of said exhibit to the jury, the Court made the following comment:

“The Court: * * * This is being introduced, as I understand the position of the plaintiff, to show that this information was communicated to certain individuals. * * * In order that you may use that as an element to determine the intent with which the various acts were done by these various defendants.”

At the conclusion of said reading to the jury, the Court made the following statement:

“Now, gentlemen, I again want to caution you that you are not to consider that audit report (or the minutes) for the truth or falsity of what they contain other than the showing that is indicated, the minutes, that this document was discussed. It has been introduced and been accepted only to show the intent or as one of the elements of intent together with other things that may be introduced during the course of the trial, and you are to keep your mind open even on that element.”

[Assignment of Error XXVI, R. 1098-1108; Bill of Exceptions, R. 953-960]:

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

“Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell’s (Plaintiff’s Exhibit 46) and in his reference to it he says this: ‘There is no evidence in this case in the first place to support the charges that are made.’

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed on this document, that the document itself is not to be considered by you as proving or disproving any of the facts or statements—strike out the ‘facts’—any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see, Mr. Dean Campbell starts out to say here, and he propounds certain questions—

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, Your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up. Now, am I right or am I wrong.

Mr. Campbell: No you did not Mr. Lawson.

The Court: I remember you making the statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

‘Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown

you that there is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.

Now, to me, it is sort of a bit of sophistry, shall I call it, to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his statement. Now, may I proceed, Your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now, Mr. Campbell proposes to show the jury that there is something in the record to substantiate at least some of the charges, and I see no impropriety in it.

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

'Now, that brings us to a couple of documents that are in evidence. Gentlemen of the jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you would honestly and sincerely respect the limitation and the instructions of the Court with reference to those docu-

ments, because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made."

Now, you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean Campbell.

Mr. Lawson: That would seem to follow, Your Honor—I agree that that is true—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose an objection to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception to that?

Mr. Lawson: Yes, Your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states, 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read

these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, Your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, Your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report.

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen: I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it.

'Possibly the matter of utmost importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co., is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co. to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.'

Now, referring to that document Mr. Lawson has said:

'I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct

violation of Your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, Your Honor.

The Court: The exception will be disallowed."

[Assignment of Error XXVII, R. 1108-1134; Bill of Exceptions, R. 89-90, 99-105, 136, 143-145, 231-232, 84-85, 251-256, 267, 611-615]:

Said District Court erred and was guilty of conduct prejudicial to the defendant in suggesting and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same, as follows:

(A) The plaintiff's witness, Frank E. Morgan, testified that he was a deputy county clerk of Los Angeles County and that he had produced the articles of incorporation of the First Security Mortgage Corporation, and amendments thereto, from the official records and files of the County Clerk's office.

"Mr. Campbell: This file, being file No. 51694 of Los Angeles County, being the articles of incorporation of the First Security Mortgage Corporation, together with amendment of said articles changing the name thereof to First Security Deposit Corporation, the original articles having been filed November 25, 1931 and the amendment thereto being filed July 25, 1932, it will be offered as Government's first in order.

Mr. Irwin: I think, Your Honor, for the purpose of objection until counsel can examine it, in the interest of time it should be marked for identification at this time and we can examine after the recess. We must, of course, ask leave to examine it before it is received. If he would

just content himself about marking it for identification at this time we could examine it as soon as we conclude here.

Mr. Campbell: May it be marked for identification at this time?

The Court: I am not in the habit of wasting the time of the Court and the jury on examinations of documents. If anybody has any document or record that they intend to produce in evidence, I want them to notify the other side and during the recess or at odd times have them examine it. I will not stop a trial to have any such documents examined. Those must be examined during a recess and not waste the time of the jury. I caution all of you, if you intend to introduce any documents in evidence that are matters of public record, unless you show the Court in advance that the revelation of that will be prejudicial, to show them to the other side in advance and have it stipulated to.

And now, clearly, there is nothing secret about these articles of incorporation and the amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes.

The document will be marked for identification. And I hope by a stipulation the first thing in the morning it may be received in evidence.

(The file referred to was marked as Plaintiff's Exhibit 1 for identification.)

The court thereupon made the following statement:

The Court: Very well. Let's proceed. We have a lot of things to take care of without a lot of technicalities. And when a document of that kind is introduced in evi-

dence and shows later it is spurious, it, of course, can be corrected. I am not going to waste the time of myself and the time of the jury while a lot of technical objections that are of no value, except to take the time of the Court and jury, are entered into.

Proceed." [Bill of Exceptions, R. 89 *et seq.*]

(B) Upon plaintiff's witness Milton Shaw being sworn to testify, the Court made the following remarks:

"The Court: I think possibly before we start in with this case that I ought to explain to counsel and to the jury what my position will be uniformly in connection with this case in order to save a lot of time.

As I have said in a statement previously in this trial and just immediately, that it is impossible for the Government or for the defendants to prove everything at one time, and it is impossible for proof to be made in either a chronological order or a logical order sometimes because, while the witness is on the stand, instead of recalling him several different times to get matters in either in chronological or logical order, it is better to take all of that which is his testimony and be done with it.

Now in a conspiracy case seldom is it possible to have direct evidence. Sometimes it is as to parts, and sometimes not. The conclusions have to be arrived at by a series of happenings, what I described in part at least as circumstantial evidence.

Now the admission or non-admission of testimony as it is presented by the Government is largely within the discretion of the Court in the exercise of careful, cautious judgment to protect the rights of the defendants. * * * So as to not waste the time of the jury by having them

listen to evidence which I am later going to have to strike, where I feel, from my knowledge of the facts made here and my experience in trying conspiracy cases, that the offer is made in good faith and that there is a reasonable ground to believe that it can and will be properly connected up, I shall admit it, reserving to counsel for the defendants the right at the conclusion of the Government's case to move to strike any evidence which has been admitted but which has not been properly connected as to being binding upon all of the defendants or as to be binding as against a particular defendant on whose behalf the motion is presented to the Court. * * *

* * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the Court and jury to make the objection that the evidence is being put in out of order, and that the conspiracy hasn't been yet proved, and so on and so forth, where I am reserving to them the right to strike. * * * The only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. I am going to give you a right, if it isn't properly connected up, to move to strike that particular evidence.

* * * * * * * * *

If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the Government to go *and the* witness

back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a technical point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to anyone except the delight of the lawyer to make technical objections and have them sustained.

Mr. Irwin: With all deference to the Court's remarks —I quite agree with Your Honor as to the fact that a record is a record of the State—but what that record may contain, I don't know. We have never seen it. It can very properly accuse somebody that had no relation with this case of the most heinous crime if he sat silent and didn't let counsel note an objection and then in argument read it to the jury.

The Court: Now manifestly it isn't fair, nor is it proper, to bring a whole set of records of the State Corporation Department and expect to have them introduced in evidence without counsel for the defendants having abundant opportunity to examine those records and determine exactly what they contain, because it isn't a question as to whether authoritative records, it is a question of whether they contain matter which may be entirely immaterial, may be scandalous, may be prejudicial, may be hearsay, may be collateral, may have absolutely no bearing upon the trial of this case.

* * * * *

You should have an opportunity to examine those and any other documents that are going to be submitted so

that we may not have to take the time of the Court and the jury to do it in the court room.

Now they are not yet admitted, and I shall charge you with examining them within a reasonable length of time so that if they are proper they may be admitted in evidence. If they aren't proper, they may be excluded.

You may proceed." [Bill of Exceptions, R. 99-105.]

(C) "The Court: Of course, I don't think the Government is required to earmark their testimony as applicable to anything. If it is admissible, it goes in, and it is up to you on cross-examination and on argument before the jury to show that it is not applicable to your particular client or to particular situations.

I see no way, unless we are going to be here to celebrate Christmas and New Year's, to do it otherwise than to get these books before the Court and get them in.

Now, they are there. You can cross-examine as to them. You can subpoena these witnesses and bring them in as a part of your own case on defense, if you wish. If there has been any misrepresentation, or if there are signatures or anything of that kind that aren't genuine, all you have to do is to establish that fact and we will strike them out.

But I shan't stay here until Christmas to satisfy a lot of technical niceties. I want to get this evidence in, get it in a way that will be protective to the defendants, but we have to get the evidence in and you must put it in piecemeal and you can't put it in either chronologically or logically in conspiracy cases, as I see it. * * *

Mr. Irwin: * * * If the Government is allowed to dump in the whole thing, then the burden is placed upon

the defendants to prove their innocence instead of on the Government to prove their guilt. * * *

The Court: Of course, I can't follow you there at all, because the mere fact that this evidence is in, the jury hasn't seen it, the jury doesn't know what is in there, and it is a long time before they are going to see it. In the meantime you have your right of cross-examination, and if these records, after your examination of them, prove to be immaterial or incompetent or not available as evidence, we will strike them out. But we can conceivably, with five or six technical lawyers, take three weeks on one book. That is just exactly why the Congress decided to get rid of these ultra-technicalities of the admission of books and records of corporations and entries in them.

I have seen technical lawyers keep a court going for three weeks on getting in one book. That has been in the past quite a common experience." [Bill of Exceptions, R. 136-137.]

(D) "The Court: I am going to go over this again, and I am going to do it for the final time because I am not going to keep on repeating it.

The way I propose to permit this case to go in—and I shall have due regard for the rights of these defendants —this case cannot all be put in at one time. That is very manifest. It covers many defendants, many transactions, many years, many books, many records. Now, I am not at all sympathetic with the position that it is very harmful before this jury because the jury don't know anything about what are in these books, and certainly no harm can be done.

I am not sympathetic with any surprise with regard to it. It is inconceivable to me that lawyers would prepare

a defense in this case without going to the records of the State Corporation Department and the Building and Loan Commissioner and finding out what they contain. I don't propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * *

* * * Now I recognize that you gentlemen are retained to defend your clients, and you are doing the very best you conscientiously can to protect their interests. There can be no doubt about that in the minds of anyone. I try to be fair to the defendants, as I am to the Government. I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the tricks in the bag by way of technicalities, and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren't getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State's office."

[Bill of Exceptions, R. 143-145.]

(E) "Mr. Campbell: If Your Honor please, the element of time is not of singular importance to me in that I am employed on an annual salary, but I had not understood that there was going to be any question that these were not the books and records of the company, but as the Court can appreciate, it is going to take us a great deal of time beyond our estimate of the time of this case if we have to prove the individual items, and produce the individual bookkeepers, where, as in the case of this witness, he does not remember certain entries or who made certain entries; and therefore can not say he made them directly.

The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, and kept in the regular course of business, and that it was the course of business, and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it." * * *

Mr. Adams: May I, on behalf of the defendant Twombly, offer this stipulation, which I think may save us a lot of time, that where the witness, without any waiver of the objections I have made or the benefit of the ruling—that where the witness testifies that he made a certain entry himself or a certain entry was made under his direction, that we eliminate the two questions and answers: 'Were these records made by you in the regular course of business?' and 'was it the regular course of business to keep such records?' because that repetition of that is taking time all of the time and I see no necessity for it.

The Court: Well, of course, that is supposed to apply to the entire group, but in order to be safe, counsel has been doing that.

Is that satisfactory to all of the defense counsel to have it so stipulated?

Mr. Irwin: Your Honor, you recall I offered that stipulation yesterday afternoon and Mr. Campbell said he didn't desire to accept it. It is still most satisfactory to me.

The Court: Is it satisfactory to you, Mr. Lawson?

Mr. Lawson: Yes, Your Honor.

The Court: You, Mr. Butler?

Mr. Butler: Yes, it is, Your Honor.

The Court: Very well. That stipulation will be received. [Bill of Exceptions, R. 218-219.]

(G) During the course of the examination of plaintiff's witness, Perkins, the following occurred:

"The witness further testified: That Plaintiff's Exhibit 141 for identification, a letter dated February 27, 1934, is a letter which he sent or caused to be sent to the holders of collateral trust certificate due May 1, 1934; that it was mailed or caused to be mailed on or about February 27, 1934. That the circumstances under which he sent and mailed that letter were the same as the previous letter.

Mr. Campbell: May this be marked Exhibit 141 for identification?

The Court: It may be so marked.

Mr. Irwin: So I will be correct, counsel, are we jumping by 140?

Mr. Campbell: Yes.

The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions. These documents can be available from early morning until late at night, and counsel can check them afterwards, rather than waste our time during the session." [Bill of Exceptions, R. 231-232.]

(H) At the conclusion of plaintiff's opening statement, the following proceedings were had:

"The Court: Now, gentlemen, it is quite apparent to the Court and the jury that there are a number of different corporations involved here. It may be a little easier for the Court, because of his particular training, to follow these transactions which I think, by the questions, I was able to do. I am not so sure that it was possibly quite as easy for all of the members of the jury. Some undoubtedly followed it just as well as did I, and possibly much faster.

I want to ask counsel for the plaintiff, and for the defendants, and ask the jury, if it wouldn't be of great assistance to all of us to have counsel, that is, counsel for the plaintiff with the approval of counsel for the defendants, get up a chart and put these corporations' names down on that chart in large type and put it on easel so that we will have it up here all the time.

First, Railway Mutual Building and Loan Association. Now you can, if you wish, put the capital structure of that off to one side, at least put the date of its organization and possibly a separate sheet showing its capital structure.

Then, second, the First Security Mortgage Corporation, then the First Security Deposit Corporation, then the Realty Deposit, then R. F. D. Discount, then Consolidated Investors, then Investment Finance Company, and then the American Bank, American Building and Investment Company, the Bond 17 Dog Food Company, and so on, so we will have here all the time these names and we will be able to fit those particular corporations into the picture.

Now, wouldn't that be helpful to you gentlemen?

(Jury assents.) [Bill of Exceptions, R. 84-85.]

Will you gentlemen prepare such a chart?

Mr. Campbell: Yes. I will be glad to.

The Court: With the assistance of counsel for the defendants.

Mr. Lawson: Yes.

If Your Honor should consider that a number of those companies are pertinent to this case, I think it will be a very helpful suggestion, but I would like to be heard in argument as to the limitations that counsel for the Government here has gone into on the case which he proposed to submit.

I would like to present to Your Honor the proposition that there are only three companies involved, that is, the First Security, the Investment Finance and the Railway Mutual.

Our position in regard to a great many of these matters that he has gone into, Mr. Campbell, are not relevant to the case and will only lead to confusion.

The Court: Well, it isn't going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the jury, they are going to ignore it, and that is that, and yet I think the continuity is there and that it would be very helpful to all parties to have them there.. [Bill of Exceptions, R. 86.]

We may not use all of them, but we may use some, and in any event, we will have the picture, and rather than being a detriment to the defendants, I would think it would be helpful to clear the whole situation up." * * *

“Mr. Adams: I don't think we ought to put upon any chart the name of an individual or company in which any particular investment was made. In other words, I think the jury might be aided by showing the diversification from the Railway Mutual to the First Security and then from the First Security to the Investors Finance.”

* * * * *

“The Court: But on this chart we have the original company, Railway Mutual Building and Loan Association, then the First Security Mortgage Corporation, which was its successor, or which took over certain assets. Then the name of that was changed to First Security Deposit Corporation. One of the subsidiaries of that, as I understand the remarks of counsel, is the Realty Deposit Company.

Mr. Lawson: Your Honor, that was a bookkeeping arrangement on the books.

The Court: Regardless of that, the name will undoubtedly appear, and we will want to know where it fits in.

Then the R. F. D. Discount Company, an affiliated organization.

Now, then, Investment Finance Company clearly appears in the chain of circumstances. I don't know to what extent Consolidated Investors was discussed by the Government in the opening statement.

Mr. Campbell: It is simply the successor or name change of the R. F. D.

The Court: That is what I thought. That can be shown.

Now, then, the State Investors Corporation, I am not just sure as to that.

Mr. Adams: That, Your Honor, is the place where I suggest Your Honor stop. When we get to Investment Finance Company, that is the Company that Mr. Campbell has alleged for the Government loaned, or made unlawful loans to this, that and the other company.

The Court: I understand the State Investors Corporation, American Building and Investment Company, American National Bank of Santa Monica, Bond 17 Dog Food Company, Pacific Brick Company, and Pierce Petroleum Company, were companies entirely outside of the capital structure purview of these corporations.

Mr. Adams: Yes, sir.

The Court: They were corporations in which money was alleged to have been invested from time to time.

Mr. Adams: Yes.

The Court: All right. We will have no confusion then. Let's confine our first chart to these seven. We have the names, the dates of organization, and the capital structure."

(I) During the course of examination of plaintiff's witness, Clarence M. Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that is not the best evidence.

* * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes

to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours?

Mr. Lawson: May I make my position clearer with reference to that, Your Honor? The use of a summary by an accountant is well recognized for financial matters, the figures, the bookkeeping; I understand that. I am objecting against this witness, who is qualified as an accountant, to testify as to what the minute books, the by-laws, or any other written matter that has been introduced here, as to what those records may contain.

* * * * *

The Court: The objection will be overruled. You may answer that question.

Mr. Lawson: Exception.

The Witness: Seven, up to a certain date.

Q. Was that number subsequently changed?

A. Yes, sir.

Mr. Lawson: May my same objection run without repetition? With the understanding, the same ruling and an exception allowed.

The Court: Yes. I am only going to allow him, if you insist upon the objection, to ask for the number of directors, provided from his examination, with the under-

standing that if the information is not correct, for any reason, that counsel will have an opportunity to correct it, either on cross-examination or by calling the Court and the jury's attention to the record."

The witness further testified: That the by-laws were amended subsequent to February 16, 1938, so as to provide for five directors of the First Security Deposit Corporation.

"Q. Mr. Bruce, as an accountant, did you also examine the charter and by-laws of the corporation, which have here been placed in evidence, for the purpose of determining what stock should be voting stock? Answer that yes or no.

A. Yes.

Q. And what did your examination disclose?

Mr. Lawson: Same objection Your Honor.

The Court: The objection will be sustained.

Mr. Campbell: May I have Government's Exhibits 1, 9 and 18?

Mr. Adams: Your Honor, while counsel is examining that, might I call your attention to the fact that in the schedules the addition is incorrect?

The Court: The schedule has been objected to by Mr. Lawson, so that it is not of any moment to us.

Do I understand, Mr. Lawson, your objection goes to these charts so that the Government need not go to the trouble of preparing those charts? If you object to one, I understand you object to both.

Mr. Lawson: Your Honor, I don't object to what I consider the companies involved here. not the First Secu-

rity and the Investment Finance Company, and the Railway Mutual.

The Court: Is this company not the First Security?

Mr. Campbell: It is the First Security.

Mr. Lawson: That is the First Security. I have no objection to any pictorial representation as to whatever the facts are with that one correction on the legend.

The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now, what is your position?

Mr. Lawson: My position is that I am anticipating this witness' attempting to summarize the minutes of the meetings of the Board of Directors to show certain facts. Now, so far as the number of directors, the capital structure, the stock issued, I haven't any particular objection to that. I am simply preserving my rights with reference to what I have anticipated will come.

The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.

Now, I want to know: What is your position. You either object or you don't object.

Mr. Lawson: I have tried, Your Honor, to make my position clear in that I am not trying to be obstreperous or trying to consume time. I am simply as I stated

to Your Honor, anticipating what this witness is going to testify as to what may be contained in the minutes.

The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by agreement of all counsel in order to save time. If you object to this witness' testifying as to what he has gleaned from these books, your objection then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the articles of incorporation, that portion of it dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation showing when there was an election and when there was a change." [Bill of Exceptions, R. 251-256.]

(J) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you point out to me, Mr. Bruce, where that is contained?

A. (Examining book.) (Pause.)

The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made

specifically and exception save at each point as to each defendant.

Mr. Irwin: * * * There are certain meetings, some of my defendants were not there, and some of them were. As to those that were there there is no objection * * * But it will be necessary for me to follow counsel, or to ask counsel in reading to state if any directors were absent, and then interpose the objection of hearsay.

The Court: Yes, you will have to make a technical objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time, the stock that was outstanding, and so forth, and we have to go back to the original; so there will be no other way to it, than for you to make objection.

Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly.

Mr. Irwin: Very well, Your Honor." [Bill of Exceptions, R. 267-268.]

(K) "The Court: Now, the matters before the Court are the minutes of the stockholders' meeting of the Pierce Petroleum Corporation under date of February 19, 1937. That was just one, was it?

Mr. Campbell: Yes.

The Court: Exhibit 84. And the letter dated January 3, 1936 passing between Pierce Petroleum Corporation

and Investment Finance Company. The Court rules that both of these documents are admissible to show intent.

You may now ask for a stipulation as to signature.

Mr. Adams: We wish an exception to the ruling.

The Court: You may have the exception.

You may ask for Mr. Adams' stipulation as to the signatures.

Mr. Campbell: At this time I will ask if it may be stipulated.

Mr. Lawson: For the purpose of the record may we have an exception?

The Court: Yes, it hasn't gone in. I will take care of that when the time comes. Give them numbers for identification now.

The Clerk: The letter will be Plaintiff's Exhibit 180 and the minutes 181.

Mr. Campbell: Might it be stipulated that—

Mr. Adams: May I ask a question first? Your Honor, in admitting these minutes, Your Honor is admitting them over the objection of no foundation?

The Court: No. It was my understanding that these documents which were being shown, signed by any of the defendants, that they were to be admitted on the stipulation of the signature, and I have been following that policy.

You said that you would now, if you ever entered into such a stipulation, withdraw from it and would insist upon the Court's first passing upon its materiality, and then you wanted it handed to you, and rather than require a handwriting expert to prove Twombly's signature, then you would then determine what you would do about it.

Now, I haven't admitted this in evidence. I have simply ruled it is material on the question of intent. I have asked counsel to submit it to you, and ask you whether you are willing to stipulate.

Mr. Adams: I don't understand you frankly. I am at a loss. I said to Your Honor that if Your Honor admitted it in evidence—now, Your Honor just said you are not. I don't know whether it is admitted, or whether it isn't. If it is admitted then it must be admitted for some purpose. What I am trying to point out, if Your Honor overrules my objection of no foundation, if Your Honor then overrules my objection of hearsay, if Your Honor overrules my objection of not being material, if Your Honor then admits it in evidence, then I will be glad to stipulate to the signature, but I want Your Honor's ruling on the matter of foundation and other points.

The Court: You are asking the impossible. How can I admit a thing in evidence when there is no foundation laid so far as the signature is concerned?

What you just stated you had said wasn't what you said at all. You said if I would rule it was material, rather than put the plaintiff to the trouble and expense of bringing in handwriting experts, that you would then determine whether you are going to yield and say that the signature of Mr. Twombly was genuine.

Mr. Adams: I felt. Your Honor, this way, as Your Honor well said to me the other day, foundation for a document may be laid in many ways.

The Court: That is right.

Mr. Adams: Foundation for this document is being laid in no way except through the signature of Mr. Twombly.

The Court: That is it, exactly. I have already ruled that no other foundation was laid and that other foundation will have to be laid in so far as the defendant Twombly is concerned unless you are willing to stipulate that those are the genuine signatures of your client.

It cannot be admitted because no foundation has, as yet, been laid as against your client.

Mr. Adams: I won't stipulate to anything at the present moment then under the ruling, and I take an exception to the ruling.

Mr. Campbell: If Your Honor please, may I withdraw these two exhibits from the identification numbers?

The Court: Yes. Just leave the identification numbers on them.

Mr. Campbell: May I withdraw or take with me the two exhibits?

The Court: You may take them out of court.

Mr. Campbell: Now, I wish to read from the minutes of the Investment Finance Company. Might I state, Your Honor, that the statement I made just prior to the noon recess that the evidence now being offered is being offered as to all defendants with the exception of the defendants Twombly and Cronk still apply?

The Court: Before we go into that, I think I want to explain my ruling. Maybe I haven't made it clear.

These minutes and a letter to which I alluded were offered in evidence. There was no foundation laid for their admission by having anyone take the stand and show that they were the records of the corporation kept in the regular course of the business and that it was the habit of the company to keep records of that type.

In the absence of that foundation the documents were, regardless of how I felt about their materiality if ad-

mitted, they were not admissible unless they could be admitted under the stipulation which we have heretofore had, * * * counsel making the point that no proper foundation was laid, and refusing to take any position as to signatures, they cannot at this time be admitted without a further foundation as to the defendant Twombly.

As to the defendants represented by the two attorneys, they may be admitted under the stipulation." [Bill of Exceptions, R. 611-615.]

[Assignment of Error XXVIII, R. 1134-1140; Bill of Exceptions, R. 147, 227-228, 251, 616-617, 679-680, 698 and 818]:

Said District Court erred and was guilty of conduct highly prejudicial to the defendant Edgerton before the jury in the following particulars:

(A) During the course of the examination of plaintiff's witness Florence Anderson, the following occurred:

"Q. But you can definitely state that those whose names I have given you with the addition of Brayton, were directors as of that date?

A. I can.

Mr. Irwin: Pardon me, Your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him. I think we are entitled to have the entire board.

The Court: Now. I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * * You may bring out those matters on

cross-examination and I shall not tolerate any more interruptions of that sort." [Bill of Exceptions, R. 197-198.]

(B) During the course of the examination of plaintiff's witness, Perkins, the following occurred.

"Asked who handed it to him for his signature, the witness answered: 'I presume it came from the manager's office; that is my best recollection.' (Thereupon Plaintiff's Exhibit 139 for identification was received in evidence. Said Exhibit is separately certified pursuant to stipulation and order of Court.)

"Mr. Campbell: I will ask to have marked as 139-B the portion of this file. With counsel's permission, may I take the two mimeographed letters away from the clip?

Mr. Lawson: Not only with my permission, but it would be very much in accord with my conception of how these letters should be introduced, that they should be introduced separately.

The Court: Just say "yes" and save a lot time.

Mr. Lawson: Your Honor, I want to call Your Honor's attention to what I think is—

The Court: (Interrupting) I don't want any discussion in front of the jury. You consent. That is all that is necessary.

Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers." [Bill of Exceptions, R. 227-228.]

(C) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that it is not the best evidence.

* * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours." [Bill of Exceptions, R. 251.]

(D) Upon offer of Plaintiff's Exhibit 46 in evidence the following occurred:

"Mr. Lawson: Your Honor, the matter really hasn't received a great deal of attention, and I think it is a very important part. Your Honor has read the comments, and you are familiar with them. I merely submit this is a test: That if the witness were on the stand himself, he wouldn't be permitted, under objection, to testify, because he would be stating opinions and conclusions. I think that is sound, Your Honor.

The Court: I disagree with you on that. I shall when the time comes instruct the jury that this is not being admitted to prove the truth of the statements contained in it, but simply to show that that information was communicated to the defendants. You mean to tell me that if that auditor told these defendants that he permitted to say that he told them in person?

Mr. Lawson: Under the circumstances of this case I would take that position, Your Honor.

The Court: Then that is a matter that will have to go to the Circuit because I disagree with you on it. I will admit it on that point. It is not being admitted to show the truth or falsity of what is contained in that auditor's report, but to show that that audit report was delivered to these directors.

Mr. Lawson: I would like to have included in the objection, which I have already made, the specific objection of hearsay. And further, that it has not been connected up in this manner; that the mere fact that it was on file with the corporate records is no proof of the direct knowledge of the defendants Ireland and Edgerton." [Bill of Exceptions, R. 616-617.]

(E) During the course of the examination of plaintiff's witness Grace Benn, the following occurred:

The witness testified "I think the gentleman I talked to that time was Mr. Ireland. At that time I discussed the purchase of my securities."

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: No.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so. I just saw him the one time.

Mr. Lawson: May the record show that is Mr. Ireland.

The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, Your Honor.

The Court: Stand up again. Is that the man you talked to, if you know?

(The defendant Ireland arose, as requested.)

The Witness: No, I don't think so." [Bill of Exceptions, R. 679-680.]

(F) During the course of the examination of plaintiff's witness, Audra D. Jones, the following occurred:

"Q. Do you recognize the gentleman in the court room with whom you had conversation on that occasion?

A. I don't think I would.

Q. Well, will you look about the court room and see if you see him here?"

Thereupon the Court directed each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had the conversation and the witness in each instance replied "No" or "I don't think so." [Bill of Exceptions, R. 698.]

(G) Plaintiff by reference incorporates paragraphs (A) (B) (G) (I) (J) (K) of the Assignment of Errors No. 27 as a part of this Assignment of Error con-

stituting conduct of the Court in the presence of the jury highly prejudicial for the defendant Edgerton.

(H) Following the introduction in evidence of defendant's (plaintiff's) Exhibit 39 reciting details concerning financial transactions of the Investment Finance Company with Pierce Petroleum Corporation and Charles E. and Maryan A. Kenner and subsequent to the admission in evidence of Plaintiff's Exhibit 46 (216), the Court made the following statement:

"The Court: Now, Gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

[Assignment of Error XX, R. 1068-1072; Bill of Exceptions R. 950-953]:

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wishes.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is located, or you may want to branch out and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I have just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So, you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, Your Honor—

The Court: And it has been relied upon in argument of nearly all of defendants' counsel in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, Your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan."

[Assignment of Error XXIII [R. 1083-1088; Bill of Exceptions R. 414, 416, 419, 427, 430, 441, 445-460]:

Said District Court erred in sustaining the objections of the plaintiff propounded to the Plaintiff's witness Kate O. Wright on cross-examination as follows:

"Q. Calling your attention to Government's Exhibit 145, which is a letter dated March 30, 1937, that in part reads: 'We now have available funds with which to purchase First Security Deposit Corporation bonds and for a limited period will pay the best cash market price available to any who desire or need money at this time for current needs or other investments.'

After the receipt of that letter, did you make any effort to determine what was the market price of those securities?

Mr. Campbell: Objected to as incompetent and improper cross-examination, and immaterial. * * * Assuming that investigation was made and that it either did or did not, as far as her investigation was concerned, disclose the truth or the falsity of that representation, that would not only be hearsay, but it would not in any degree reflect upon either the guilt or innocence of the defendants here.

Mr. Lawson: I am bearing in mind the announced purpose that counsel made to Your Honor for the introduction of the correspondence, what he intended to prove by that correspondence.

Mr. Campbell: Yes. My announced purpose is to show that the statements made to this witness were false, but any investigation or hearsay which she obtained, proving or disproving its falsity would not be a material element and it certainly is not proper cross-examination.

The Court: Well, I follow your reasoning and I am inclined to agree with you on the last objection as not proper examination. I won't say what position I will take as to the other matters when they come in as part of the defense.

Even so I think this particular question is proper on cross-examination, this one that she may answer yes or no. Will you please read that question once more?

You may answer that question as yes or no: Did you make any investigation?

The Witness: I believe not.

By Mr. Lawson:

Q. Did you consult Mr. Richmond with reference to that matter as to market price?

Mr. Campbell: I object to that as incompetent and immaterial.

The Court: Objection sustained as not proper cross-examination.”)

(To which ruling of the Court, the defendants duly took an exception.)

“Q. Now, I call your attention to Government's Exhibit No. 146, which is a letter dated April 8, 1937, addressed to the Investment Finance Company. This is a copy, but bearing a signature, or a typewritten name, 'Kate Orwall Wright,' and call your attention to this part of it. I will read it in its entirety as it is short:

‘In reply to your letter of March 30th, regarding the First Security Deposit Corporation stock, will you kindly advise me what the best cash market price is for this stock at the present time?’

Now, I call your attention in connection with that letter, to the further letter, Government's Exhibit 147, dated April 13, 1937, which reads as follows:

'With reference to your letter of April 8, 1937, please be advised that we can enable you to procure the sum of \$619.94 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-9344.'

Now, I will ask you if upon the receipt of that letter, dated April 13, 1937, Government's Exhibit 147, that that satisfied your inquiry as to the market price.

Mr. Campbell: Objected to as incompetent and improper cross-examination.

The Court: The objection is sustained. The letter speaks for itself."

(To which ruling of the Court, the defendants duly took an exception.)

"Q. Calling your attention to Government's Exhibit No. 152, which is a carbon copy of a letter dated August 9, 1938, which is addressed to you and signed by the Investment Finance Company—this is the letter of the offer of \$662.65—now in response to that letter you sold your bonds for that price, is that correct? A. Yes.

Q. And you got the money and surrendered the securities? A. I did.

Q. Now at that time did you have any information or independent knowledge of your own as to the market price of those securities?

Mr. Campbell: Objected to as incompetent, improper cross-examination.

The Court: Objection sustained."

(To which ruling of the Court, the defendants duly took an exception.)

Said witness Wright on direct examination testified that she was the owner of Certificate A-934, 11 shares of Class A Preferred stock of the face value of \$220.00 and a cumulative bond A-6721 of the face value of \$854.20 of the First Security Deposit Corporation; and identified Plaintiff's Exhibits 144 to 152, respectively, as letters either received by her from the Investment Finance Company or written by her, or under her instructions, to the Investment Finance Company. With respect to the offer of these letters the plaintiff stated that these letters were "offered to show that this course of relationship had been established between the company and the witness who is on the stand and which offers were made from time to time of varying amounts for her stock and certificates."

Plaintiff's Exhibit 145, a letter from the Investment Finance Company to the witness recited that the company had available funds with which to purchase First Security Deposit Corporation bonds and would pay the best cash market prices available to any who desired and that changing market conditions may affect a quotation and that the offer would remain open only for such time as the Investment Finance Company was able to meet the demands under current conditions; Plaintiff's Exhibit 146 is a letter from the witness in reply reciting:

"Will you kindly advise me what the best cash market price is for this stock at the present time."

Plaintiff's Exhibit 147 was an answer to Exhibit 146 and recited:

"Please be advised that we can enable you to procure the sum of \$619.00 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-934."

Plaintiff's Exhibit 151, dated July 5, 1938, recites:

"We are able to this time to return to you \$640.65" for Bond No. A-6721; and Plaintiff's Exhibit 152, dated August 9, 1938, to the witness recites:

"Replying to your letter of August 6, 1938 regarding securities of the First Security Deposit Corporation, Bond No. A-6721 * * * and Certificate No. A-934 * * * we can obtain for you a total of \$662.65 for the bond and preferred stock."

The witness further testified on direct examination that after she had received the above correspondence she finally sold her securities to the Investment Finance Company for \$662.65.

[Assignment of Error XXIV [R. 1088-1090; Bill of Exceptions R. 433-437]:

Said District Court erred in sustaining the objections of the plaintiff to certain questions on cross-examination propounded to the Plaintiff's witness George U. Richmond. On direct examination the witness testified he was vice-president of the American National Bank of St. Joseph, Missouri. The witness was then asked on direct:

"Q. Mr. Richmond, as vice president of the bank, did you have occasion to represent Mrs. Kate Orwall Wright in a matter with reference to her securities in the First Security Deposit Corporation? A. I wrote several letters in her behalf."

The witness further testified that Plaintiff's Exhibit 153 was a letter written by him addressed to the First Security Deposit Corporation under date of July 19, 1938 reciting

that one of the customers of his bank held Bond No. A-6729 and Certificate A-934 and inquiring if she should sell the securities on the market at the present time, and "Can you tell us about what she should receive for them"; the witness further testified that Plaintiff's Exhibit 155 was a letter addressed to him from the First Security Deposit Corporation dated August 3, 1938, which said letter was a letter replying to the witness' letter under date of July 19, 1938, reciting that "we understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock."

The witness testified on cross-examination that he was acting for Mrs. Wright in connection with this matter; that in a sense he was her financial adviser; that he talked to her about this transaction; in answer to the question of whether he had made any independent investigation as to the matter, he said: "I wrote several letters to California banks, to Los Angeles banks."

Then the following occurred on cross-examination:

Q. You have stated here that in reference to this letter of July 19th, which is Government's Exhibit 153, that you were advising Mrs. Wright in reference to this matter, the matter of the sale of these securities? A. I said I discussed it with her. I don't know that I gave her any advice as to what to do.

Q. And you said you wrote the letters to Los Angeles banks? A. Yes, sir.

Q. Inquiring, I presume, as to the value? A. As to the market; yes.

Q. And did you get some replies on that? A. I did.

Q. Do you have any of that correspondence with you?
A. I don't have it personally. It might be here. I don't know.

Q. You don't know where it is? A. We have a folder. I think perhaps it is in the hands of the Government."

The witness was asked whether he had any independent recollection as to what information he received from these banks with reference to the sale of these securities, to which the plaintiff objected on the grounds that the same was incompetent and improper cross-examination; said objection was sustained, to which ruling of the court the defendants noted an exception.

The witness was then asked after receiving those letters from the banks if he advised Mrs. Wright further with reference to the sale of these securities, to which question the plaintiff objected on the grounds that the same was incompetent and improper cross-examination; said objection was sustained, and to which ruling of the court the defendants took an exception.

The witness was asked if after receiving the letter of August 3rd, Plaintiff's Exhibit 155, that he gave Mrs. Wright any advice with reference to the contents of that letter; and objection was made that the same was immaterial and sustained by the court, to which ruling of the court an exception was noted.

[Assignment of Error XXXIV, R. 1176-1180; Bill of Exceptions, R. 604, 611, 802-807, 817-818, 916 and 922]:

Said District Court erred in permitting evidence regarding transactions between the Pierce Petroleum Corporation and the Investment Finance Company over the ob-

jections and exceptions of the defendants and each of them. Plaintiff's Exhibit 180 is a letter dated January 3, 1936 bearing the receipt stamp of the State Corporation Department of California and signed "Investment Finance Company, by J. H. Edgerton, Vice-President and C. W. Twombly, Secretary" and containing consent to the contents of the letter on behalf of the Pierce Petroleum Corporation by J. H. Edgerton, President, and C. W. Twombly, Secretary, said letter reciting that an agreement was entered into between the Pierce Petroleum Corporation and the Investment Finance Company on November 16, 1935 wherein the Pierce Petroleum Corporation agreed not to issue any stock without the consent of the Investment Finance and that certain escrow instructions were entered into; that the Investment Finance Company has been advised that the Pierce Petroleum has filed an application for the issuance of 1995 shares of stock to Boedecker, J. H. Edgerton and C. W. Twombly and that the Pierce Petroleum Corporation may consider the letter a written authorization for allowing said stock to be issued, copy of which is recited as being forwarded to the State Corporation Department.

Plaintiff's Exhibit 181 are the minutes of the annual stockholders' meeting of Pierce Petroleum Corporation held on February 19, 1937 showing stockholders present, namely, Boedecker, 100 shares, J. H. Edgerton, 200 shares, C. W. Twombly, 100 shares, Investment Finance Company by proxy, 5 shares.

"Mr. Campbell: Now reading from Plaintiff's Exhibit 42, the journal of the Investment Finance Company, reading from page 204 of such journal:

A debit item of \$24,369.80, loss on Pierce Petroleum well No. 1.

'To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claim against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250 cash.'

"Mr. Campbell: The item is dated December 31, 1939, and is set forth on page 204 of Plaintiff's Exhibit 42. The following debit items:

'Suspense, \$2,250. Reserve for depreciation oil well equipment, \$1,844.44, unearned discount accounts purchased, \$2,653.18, unearned income on service rendered, \$435.18, deposit Signal Hill Water Department, \$150.00. Loss on Pierce Petroleum Well No. 1, \$24,369.80.'

The following credit items:

'Accounts receivable, Pierce, \$2,696.27, oil well equipment, \$10,000; notes receivable, Pierce, \$19,006.33. To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claims against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for \$2,250.00 cash. Deposit consists of \$150.00 deposited with the Signal Hill Water Department by the Pierce Petroleum Corporation, which is to be withdrawn and refunded to this company on February 15, 1939, as per agreement in file.'"

The motion was made to strike the portions of the minutes read from Plaintiff's Exhibit 42, which said motion was granted by the court and the jury accordingly instructed; whereupon, over the objections and exceptions of the defendants, there was offered and received in evidence portions of the books and records of the Investment Finance Company (Plaintiff's Exhibit 39) showing loans

by the Investment Finance Company to Pierce Petroleum as follows:

"Mr. Campbell: Reading now from Plaintiff's Exhibit 39, the cash journal of the Investment Finance Company, from page 7 thereof.

'December 17, 1935.

Notes receivable—Pierce Petroleum, debit \$2100; income from service rendered, credit, \$435.18; unearned discount on accounts purchased, credit \$2,564.82; to set up \$21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per cent from date) to cover indebtedness to Investment Finance Company for \$15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation \$1,000 chattel mortgage L No. 24 from Charles E. and Maryan A. Kenner—\$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—\$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in ledger)—services rendered by C. W. Twombly and J. H. Edgerton for Investment Finance Company, amount of \$435.18 balance credited to Unearned Discounts on Accounts Purchased.'

The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant for the reason the same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment.

[Assignment of Error XXXV, R. 1181; Bill of Exceptions, R. 822, 856 *et seq.*, 920, and 922]:

Said District Court erred in receiving in evidence over the objections and exceptions of defendants evidence pertaining to the application of the Pacific Brick Company to sell and issue stock, and the issuance of certain shares of its common stock to certain defendants and the Investment Finance Company, and the transfer by the Investment Finance Company of certain obligations of the Pacific Brick Company to the First Security Deposit Corporation in part payment of its debt to said First Security.

Plaintiff's Exhibit 10 is an application dated May 27, 1937 addressed to the Department of Investment, Division

of Corporations of the State of California, applying for a permit authorizing it to sell and issue its stock, reciting its previous incorporation, the names of its five directors, among which were the defendants J. Howard Edgerton and E. C. Thomas, describes the property it proposes to acquire, the nature of its business is to be that of extracting clay from said property and the manufacture of bricks and other clay products, and that it seeks a permit to issue 50,000 shares of common stock of the par value of \$1.00 per share and 50,000 shares of preferred stock of the par value of \$1.00 per share.

Plaintiff's Exhibit 11 is an application for an amendment to permit to issue and sell securities, likewise addressed to the Division of Corporations of California, dated October 19, 1938, reciting that on October 11, 1938 a permit was issued to the Pacific Brick Company authorizing the company to issue to the persons named in its application an aggregate of not to exceed 10,000 of its common shares and further reciting that the Investment Finance Company was not named in the original application as a person or corporation to which applicant proposed to sell its shares, and requesting that the permit be amended to include the Investment Finance Company. The plaintiff was further permitted to show that the books and records of the Pacific Brick Company reflected that on the 20th day of August, 1937, 500 shares of its common stock was issued to defendant E. C. Thomas and 1410 shares to the defendant R. W. Starr. That the books and records of the Investment Finance Company disclosed that as of the 28th day of July, 1938 it had acquired 16,106 shares of the Pacific Brick Company for a consideration of \$13,313.49, that as of August 5, 1938,

it had acquired 5000 shares for a consideration of \$5,000.00.

The witness Bruce was permitted to testify that the Investment Finance Company transferred obligations of the Pacific Brick Company in the sum of \$38,415.33 to the First Security Deposit Corporation as part of the assets transferred in retirement of its obligation of \$240,465.80 to said First Security.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVI, R. 1184; Bill of Exceptions, R. 856 *et seq.*]:

Said District Court erred in permitting evidence to be received concerning the loan of moneys by the Investment Finance Company to the Bond 17 Dog Food Company and the purchase of the common stock of said Dog Food Company by said Investment Finance Company, over the objections and exceptions of the defendants and each of them. And in permitting the plaintiff's witness Bruce to

testify over the objections and exceptions of the defendants and each of them that the Investment Finance Company transferred to the First Security Deposit Corporation as part of the retirement of its obligation to the First Security obligations of the Bond 17 Dog Food Company.

The witness Bruce testified that as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation to the First Security Deposit Corporation of a note payable in the amount of \$240,-465.80; that said obligation was retired as of that date by the transfer of assets of the Investment Finance to the First Security. Said witness was permitted to testify that included in these assets transferred to the First Security were obligations of the Bond 17 Dog Food Company in the amount of \$111,018.81 to the Investment Finance. The court permitted the evidence showing that between the period of February 1, 1938 and January 24, 1939 the Investment Finance Company had acquired 89,042 shares of the Bond 17 Dog Food Company at the price of \$45,-826.17; and that between the dates of May 10, 1938 and April 24, 1939 had loaned to the Bond 17 Dog Food Company at various dates sundry sums of money aggregating \$63,800.00 upon which sundry repayments in the amount of \$22,000.00 had been made leaving a balance of \$41,-800.00 which was transferred to a Notes Receivable account of the Investment Finance on May 1, 1939; that thereafter the Investment Finance loaned further sums during the period of May 2, 1939 and August 8, 1940, during which period no repayments were made, leaving as of August 31, 1940 an aggregate balance of Notes Receivable from said Dog Food Company of \$65,150.00.

The grounds of said error in overruling said obligations of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVII, R. 1186; Bill of Exceptions, R. 856 *et seq.*, 912 and 922]:

The District Court erred in receiving in evidence over the objections and exceptions of the defendants' evidence pertaining to the application of the American Building and Investment Company to the said Corporation Commissioner of California for a permit to issue shares reflecting that the principal purpose of said corporation was investment in real estate loans, business investments and financing of a general insurance agency; that on August 12, 1938 the Investment Finance Company subscribed for and bought 17,000 shares of the 25,000 shares originally issued by said American Building and Investment Company, paying therefor the consideration of \$17,000. Said Investment Finance Company transferred to the First Security Deposit Corporation in connection with the retirement of its obligation to said First Security on August 31,

1940 obligations of the American Building and Investment Company to it in the sum of \$19,339.74.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVIII, R. 1187; Bill of Exceptions, R. 374-375, 856, 912 and 922]:

Said District Court erred in admitting in evidence over the objections and exceptions of the defendants the testimony of the plaintiff's witness Bruce that as of August 31, 1940 the books of the Investment Finance Company reflected that the obligation of the Investment Finance Company to the First Security in notes payable in the amount of \$240,465.80 as of August 31, 1940 was retired in part by the transfer to said First Security of 23,646 shares of the common stock of the American National Bank of Santa Monica.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXIX, R. 1189; Bill of Exceptions 899 *et seq.*]:

Said District Court erred in each instance in denying the written motions of the defendant Edgerton, to strike and/or exclude from the consideration of the jury certain exhibits and testimony made at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case. The grounds of said errors in denying said motions to strike were and are the grounds set forth in said written motion which said written motion is set forth in full in the Bill of Exceptions and by reference is incorporated herein as though fully set forth.

No. 10136

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLIFFORD W. TWOMBLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

SEP 25 1943

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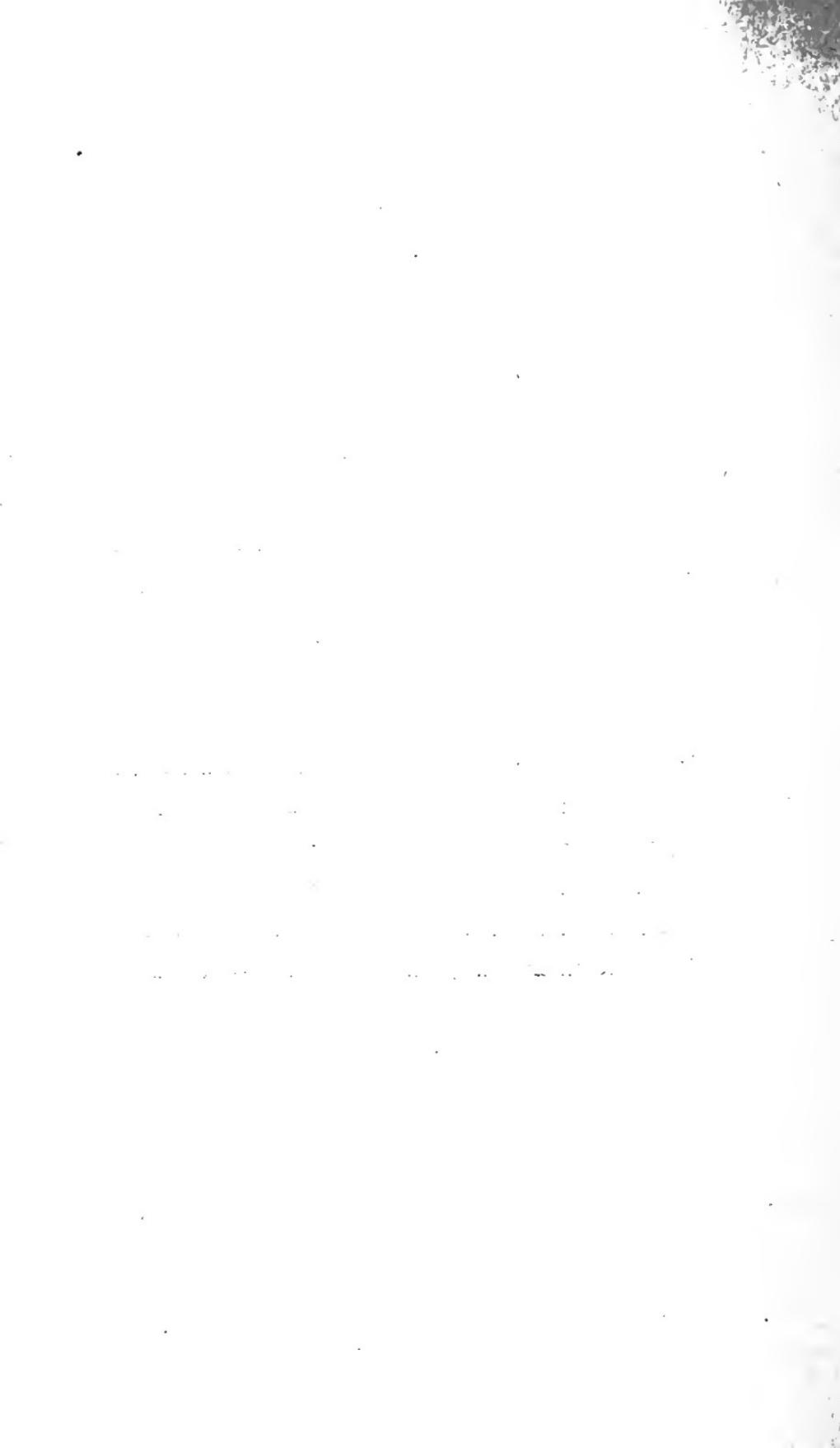
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No. 10136

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

CLIFFORD W. TWOMBLY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Basis of Jurisdiction.

The opening brief in the Edgerton appeal sets forth the basis of jurisdiction, and reference is made thereto.

Statement of the Case.

ISSUES PRESENTED BY INDICTMENT.

Appellee, United States of America, hereby adopts the statement of the case as set forth in its Answering Brief to appellant Edgerton's brief, and respectfully refers the Court thereto.

Statement of Facts.

We adopt the statement of facts as set out in the Answering Brief of appellee, United States of America, to the Brief of appellant, J. Howard Edgerton, and, in addition thereto, for the purpose of identifying the appellant C. W. Twombly to the matters involved, we set forth the following facts:

Appellant C. W. Twombly became general manager of the First Security Deposit Corporation on or about November 1, 1934, and severed his connection with said corporation on or before December 21, 1938; that appellant C. W. Twombly was general manager for the First Security Deposit Corporation from on or about November 1, 1934 to on or about September 21, 1938. He was also secretary of First Security Deposit Corporation from on or about November 1, 1934 to on or about September 21, 1938, and he was a director of said corporation from on or about December 1, 1934 to on or about December 21, 1938. He was a member of the executive committee of said corporation from on or about February 19, 1936 to on or about September 21, 1938 [R. 274].

As to the Investment Finance Company, he was secretary from on or about September 5, 1935 to on or about September 12, 1938. He was also treasurer for said company from on or about September 5, 1935 to on or about March 7, 1939. He was also general manager for said company to on or about September 21, 1938, and was a member of the board of directors from on or about September 5, 1935 to on or about December 21, 1938 [R. 276].

As of August 18, 1937, appellant C. W. Twombly owned 260 shares of stock of the Investment Finance Company [R. 288]. Appellant Twombly acquired 10 shares of said stock on or about October 5, 1935, for which he paid \$10 in cash [R. 577]. On July 6, 1936 appellant Twombly acquired 10 shares of stock in said company for which he paid \$10 in cash [R. 287]. On December 30, 1936, he acquired 240 shares of stock in said company for which he paid \$240 in cash [R. 560].

That on or about November 9, 1936, defendants R. W. Starr, J. Howard Edgerton, E. C. Thomas, C. W. Twombly, and J. L. Smale attended a meeting of the board of directors of Investment Finance Company at which time the following resolution was adopted:

“WHEREAS, it appears for the best interests of this corporation that substantially all of the assets of the Consolidated Investors, a California corporation, be purchased by this corporation for a sum not to exceed \$36,000.00 in cash;

“Now, THEREFORE, BE IT RESOLVED, that the officers of this company be and they are hereby authorized to negotiate, enter into all necessary contracts with respect to, and execute any and all necessary instruments necessary to complete the purchase of substantially all of the assets of the Consolidated Investors, a California corporation, including the following securities:

- 3375 shares Common Stock of the First Security Deposit Corporation,
- 2331 shares of Class A. Preferred Stock of the First Security Deposit Corporation, with a total par value of \$46,620.00;
- 827 shares of Class B. Preferred Stock of First Security Deposit Corporation, with a total par value of \$16,540.00;
- 209 Full Paid Income Shares of the Railway Federal Savings & Loan Association, with a total par value of \$20,900.00 (said shares in the amount of \$15,000 being subject to a hypothecation agreement with one F. E. Jones, said hypothecation agreement being guaranteed by R. W. Starr, J. H. Edgerton, A. R. Ireland, C. E. Thomas, F. A. Anderson, and W. S. Brayton).”

This transaction was consummated by the payment of \$36,000.00 by the Investment Finance Company to the Consolidated Investors.

On November 16, 1938 at a meeting of the board of directors of First Security Deposit Corporation, with the following directors present: R. W. Starr, E. C. Thomas, A. R. Ireland, C. W. Twombly, and Wm. Leffert, on motion of Mr. Thomas, seconded by Mr. Twombly, and carried, the sale of 13 first trust deeds in the sum of \$13,407.62 was made to the Investment Finance Company for First Security Deposit consolidated trust bonds and interest in the amount of \$13,409.09 [R. 583].

At a meeting of the board of directors of Investment Finance Company held on October 13, 1936, at which time the following directors were present: R. W. Starr, J. H. Edgerton, C. W. Twombly; absent: Messrs. E. C. Thomas and J. L. Smale, the following action took place:

“The meeting was called for the purpose of further discussing plans, terms, conditions and mode of procedure in connection with the change of ownership of the American National Bank of Santa Monica, California.

“It was proposed that this corporation loan the sum of \$40,000.00 or buy stock in the sum of \$40,000.00 in the said bank, an equal amount to be put up by Batelle-Dwyer and Company, for the purpose of acquiring sixty per cent of the capital stock of the said bank; that a plan be followed as deemed advisable by Mr. Edgerton, Dr. Starr and Mr.

Twombly either as to the purchase of the shares and the formation of a voting trust, a loan to Batelle-Dwyer and Company, or a combination loan and purchase to be worked out on terms decided by Mr. Edgerton, Dr. Starr and Mr. Twombly.

"This is signed by J. H. Edgerton, Chairman, C. W. Twombly, Secretary." [R. 374-375.]

At a meeting of the board of directors of Investment Finance Company, held on January 19, 1938, at which time the following directors were present: R. W. Starr, E. C. Thomas, J. H. Edgerton, J. L. Smale, C. W. Twombly, and A. R. Ireland, the following action took place:

"On motion of Mr. Smale, seconded by Mr. Thomas and Terry, it was resolved that Mr. Twombly and Mr. Edgerton place such value as they saw fit on assets purchased from the Consolidated Investors in order that the segregation values could be determined."

At a regular meeting of the board of directors of Investment Finance Company, held August 17, 1938, the following directors were present: R. W. Starr, C. E. Thomas, J. L. Smale, A. R. Ireland, and C. W. Twombly. In addition to the directors, J. H. Edgerton was also present. At this meeting, R. W. Starr, as chairman, and C. W. Twombly, as secretary, fixed the value of the assets purchased from the Consolidated Investors in the sum of \$36,000.00 [R. 549-552].

On November 4, 1937, appellant Twombly had a conversation with Alice Geddes, in which conversation appellant Twombly stated in substance: that the best offer on our holdings would be seventy cents on the dollar; that he felt in the future it wouldn't be as good, if they could offer us anything at all; that he felt that business conditions in general were very bad and in fact he, himself, wanted to withdraw from the company as soon as possible, as soon as he could settle his own business affairs with the company [R. 725].

That in the month of May or June, 1937, appellant Twombly had a conversation with Lyman S. Walker concerning conditions of the First Security Deposit Corporation; that he told Mr. Walker that they were in a bad condition and practically on the verge of bankruptcy; that the securities wasn't worth a lot of money, but that they could take care of them at some kind of a price for us, and that he stated a price that didn't satisfy us; that at or about this same time, appellant Twombly had another conversation with Lyman S. Walker in which conversation appellant Twombly stated in substance that inasmuch as the company was right on the verge of a breakdown, and that he told us he could give us around what he offered us before, maybe a dollar or more [R. 744-745].

POINT I.

Appellant Twombly Did Cause or Aid or Assist in Causing the Letters Charged in the Indictment to Be Mailed.

Appellant Twombly contends that the evidence without dispute indicates that appellant did not cause or aid or assist in causing the letters charged in the indictment to be mailed because:

- a. Appellant Twombly as a member of the Board of Directors of Investment Finance Company was absent from the meeting of the Board of Directors that hired C. L. Cronk, who was a defendant in the case, to contact the security holders of First Security Deposit Corporation for the purpose of obtaining their securities at a discount.
- b. That at other meetings of the Board of Directors of the Investment Finance Company he, as a member thereof, voted "no" to extend C. L. Cronk's employment.
- c. That all of the letters contained in the substantive, the counts of the indictment, were dictated by C. L. Cronk to Joan Marie Brauer employed by the First Security Deposit Corporation as switchboard operator, file clerk and stenographer.

C. L. Cronk was hired by the Investment Finance Company on or about June 24, 1937 and it is true that appellant C. W. Twombly was absent at that particular meeting of the Board of Directors [R. 277]. In pointing

out this fact appellant Twombly states in his brief, page 8, line 26, page 9, line 10,

“that at the next meeting it was resolved that Cronk’s employment be extended and Twombly voted ‘no;’ that at the next meeting it was voted that Cronk’s employment be extended and Twombly voted ‘no.’ At the next meeting it was again voted that Cronk’s employment be extended and Twombly voted ‘no.’”

However the record shows that the meetings referred to by appellant Twombly were not the “next meetings” after the hiring of Cronk on June 24, 1937, but to the contrary the meetings referred to were not held until August 17, 1938 [R. 872] September 21, 1938 [R. 873] October 19, 1938 [R. 873]. The earliest meeting was held over a year after C. L. Cronk’s employment.

Apparently appellant Twombly approved the employment of C. L. Cronk as the record shows from the date of the hiring of C. L. Cronk until August, 1938, the Board of Directors of the Investment Finance Company had held several meetings at which time appellant Twombly was a member thereof and attended said meetings which took favorable action by extending C. L. Cronk’s employment with the Investment Finance Company. These meetings were held on the following dates: May 25, 1938 [R. 874] June 1, 1938 [R. 875] July 20, 1938 [R. 542]. The minutes of each of the meetings of the Board of Directors are set out in detail in the appendix, pages 1 and 2.

The record also shows that in the meantime many of the letters charged to the indictment were sent out through the mail on the stationery of Investment Finance Company, over the signature of C. L. Cronk [R. 10-30]

Appellant Twombly admits this, but argues that although the minutes of those meetings were signed by him as secretary, whether or not he voted upon the resolution extending Cronk's employment, the records do not disclose, and we assume that he infers therefrom that the presumption should be, that he did not favor the extension of Cronk's employment. If we adopt appellant's reasoning on this particular phase we can say that, if because of appellant's absence from the Board of Directors' meeting which hired Cronk, the presumption is that he did not favor Cronk's employment, then by the same token because he was present at all other meetings of the Board of Directors which extended Cronk's employment, he was in favor thereof. At least he thereby acquiesced in the action taken by the Board of Directors.

It Is Well Established That the Mailing of the Count Letters Need Not Have Been Personally Performed by the Defendants.

The following cases present varying examples of evidence deemed sufficient to meet the requirements of the statute:

United States v. Fleming, 18 Fed. 907;

Giles v. United States, 84 F. (2d) 943, 946 C. C. A. 5th);

Spear v. United States, 228 Fed. 485, 488 (C. C. A. 8th);

Barnard v. United States, 16 Fed. (2d) 451, 453 (C. C. A. 9th);

Greenbaum v. United States, 80 Fed. (2d) 113, 125 (C. C. A. 9th) (reversed on other grounds);

Lonergan v. United States, 95 Fed. (2d) 642, 643 (C. C. A. 9th).

In *Barnard v. United States*, page 453, this Honorable Court stated the following rule:

“The contention that the testimony was insufficient as to certain counts is based upon the alleged insufficiency to prove the use of the mail to execute the scheme. But the evidence was ample to show that the letters in question passed through the mail, and that they were placed in the mail by the agents or clerks of some of the plaintiffs in error. The plaintiffs in error, therefore, caused the letters to be placed in the Post Office to be sent or delivered, within the meaning of the mail fraud statute. (citing U. S. v. Kenofskey, 243 U. S. 440, 37 S. Ct. 438, 61 L. Ed. 836.)”

In *United States v. Fleming, supra*, page 908, the Court said,

“It is not necessary, in order to make out a case under the law, that the defendant shall be the inventor or originator of the scheme or artifice to defraud. * * * If a man adopts some old scheme which another devised and acts upon it, he has made it his own for the purposes of this act. It is also not necessary to show, in order to make out this offense, that the defendant’s actually, with their own hands, placed a letter or packet in a Post Office. If it appears from the proof that it was done through their agency or direction, by an employee or agent of the defendants, employed and directed for that purpose, it is enough.”

In *Davis v. United States*, 55 Fed. (2d) pp. 550, 552 (C. C. A. 5),

"It was not necessary to show that Davis had actually signed the letter or had personally deposited it in the mail. If it was mailed in furtherance of the scheme, in the usual course of business, and of this there could be no reasonable doubt, it was sufficient evidence to support the conviction."

The record also shows that appellant Twombly wrote some letters himself: Plaintiff's Exhibit 144 [R. 445-447]; Plaintiff's Exhibit 147 [R. 449-450]; Plaintiff's Exhibit 167 [R. 709-711].

The letters referred to bear the name of the Investment Finance Company. They were apparently posted from the company's place of business [R. 468-469] and were signed with the company's name with the purported signatures of appellant Twombly and the admitted employee C. L. Cronk, all of which sufficiently showed mailing of the letters by the appellant Twombly. (*Greenbaum v. United States*, *supra*.) Appellant Twombly admits that he was a Director and Secretary Treasurer of the Investment Finance Company from the date of its incorporation in 1935, continuing as such until December 21, 1938 and as its General Manager until September 21, 1938 (Brief p. 4, lines 12-16). He was also a Director and Secretary of First Security Deposit Corporation from December 1, 1934 to December 21, 1938 and its General Manager from November 1, 1934 to September 21, 1938 and also a member of its Executive Committee from February 19,

1936 to December 21, 1938. The record also shows that during that time he interviewed several of the security holders relative to persuading them to part with their securities at a discount [R. 727; 744].

We must assume that the duties of appellant Twombly, as an officer of the two companies, required his presence in the office of those concerns and that he interested himself in the general supervision of the office management and of the stenographic services. Therefore, the evidence is sufficient to infer mailing by appellant Twombly.

In the case of *Wells v. United States*, 9 F. (2d) 335, 337 (C. C. A. 9), the evidence showed the defendant's participation in a scheme to defraud by means of false representation including the defendant's presence in the office of the concern for several months, also defendant's interviews with prospective purchasers and a general supervision by him of the office and the stenographer, etc.. and the court held that such evidence was sufficient to sustain conviction though he did not sign either of the letters charged to have been mailed in execution of the scheme.

POINT II.

The Admissibility of Plaintiff's Exhibit 216 (Twombly's Statement) as an Admission Against Appellant Twombly Only Was Proper.

Appellant Twombly questions the admissibility of Plaintiff's Exhibit 216. As stated by him, appellant Edgerton covered the same point in his brief as Point VI, pp. 88-112. We stated in our answering brief thereto that the purpose of its introduction was upon two grounds:

1. As an admission against interest on the part of defendant Twombly, and
2. To show his joining the scheme or enterprise and as to him the existence of a scheme or enterprise, in other words an intent or knowledge [R. 732].

Because the introduction of said Exhibit 216 was limited to appellant C. W. Twombly, appellant Edgerton was not affected thereby. Consequently we confined our discussion in our answering brief to appellant Edgerton to the point only as it related to him, reserving any further comments thereon in answer to what might be raised by appellant Twombly. It appears that appellant Twombly has adopted appellant Edgerton's contention, that said Exhibit 216 was inadmissible as hearsay, and that a document written after the consummation of all the acts related therein is not admissible to show intent of the party making the statement.

To properly answer appellant Twombly on this point it will be necessary for us to become somewhat repetitious and make cross reference to the record, both to appellant

Edgerton's brief and the appellee's brief in answer thereto. As heretofore stated, Plaintiff's Exhibit 216 (the Twombly statement) was introduced as an admission against interest on the part of appellant C. W. Twombly.

We respectfully refer the court to our answering brief to appellant Edgerton, pp. 52-55 for authorities cited in support thereof and in addition thereto, cite the cases of

Brown v. United States, 150 U. S. 93, 98; 14 S. Ct. 37, 39; 37 L. Ed. 1010;

and

United States v. Wood, 39 U. S. 430, 14 Pet. 430, 10 L. Ed. 527,

which held that a man's own acts, conduct and declarations when voluntary are also admissible in evidence against him, and the rule stated in Wigmore on Evidence, volume IV, Section 1076, p. 116,

“* * * The principle is particularly illustrated by the rule in regard to the admissions of a *co-defendant in a criminal case*; here it has always been conceded that the admission of one is receivable against him only. * * *” (emphasis by the author).

It is apparent that both appellant Edgerton and appellant C. W. Twombly have overlooked the fact that Plaintiff's Exhibit 216 was introduced as an admission against its maker C. W. Twombly only, for they attack its inadmissibility on the following grounds:

1. Hearsay;
2. That it was offered as evidence of the truth of the matter asserted;
3. Time of its making.

(1) Admissions Are Either Not Within the Prohibition of the Hearsay Rule or Are an Exception.

"For example as an extra judicial statement it would ordinarily be obnoxious to the Hearsay rule; but admissions are either not within the prohibition of that rule, or are an exception to it; this being the ground for receiving admissions in general * * *. it suffices also for confessions." Volume III, Wigmore on Evidence, Section 816, p. 231, and

"* * * any and every statement by an accused person, so far as not excluded by the doctrine of confession * * *, or by the privilege against self crimination * * *, is usable *against him* as an admission * * *. Thus, it is unnecessary for the prosecution to establish the propriety of such statement under the present Exception, because they would be in any case receivable as admission * * *" Volume VI, Wigmore on Evidence, Section 1732, p. 99 (emphasis by the author).

(2) Plaintiff's Exhibit 216 Was Not Offered as Evidence of the Truth of the Matter Asserted Therein.

As stated in our answering brief to appellant Edgerton on this point, p. 56, the trial court instructed the jury to that effect [R. 1032] and again the trial court made the following statement to the jury relative to the introduction of Plaintiff's Exhibit 216:

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. You are all very intelligent men, and I believe are capable of following the direction of the court as to the law involved and that you will do so. * * * We describe this as a narration, as a narration of what has

happened in the past. Now that document isn't evidence which you may properly consider in any way, shape or manner, as against any defendant in this courtroom, including the defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that. To illustrate whether or not those things were true or false would be immaterial so long as defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances.

Now it is very important to these other defendants and to the defendant Twombly himself, that this document which contains statements about a lot of different matters, is only admitted for the purpose of showing Twombly's intent and is no evidence whatsoever, and this must be considered by you, as the truth of the statement made in this communication." [R. 791, 793.]

The Court also instructed the jury as follows:

"Now I want to talk to you a little bit about this exhibit 216, which as you will recall is the alleged statement of the defendant Twombly. You were admonished upon the truths of this evidence that the same was introduced against defendant Twombly only, and likewise restricted to the said defendant Twombly as bearing only upon the element of intent. Now in connection with that instrument, and also in connection with this audit report, exhibit 155, and any other exhibits which have been restricted to the subject of intent, you must be very careful not to consider as evidence in any way of the facts which are indicated or of the facts or declarations which are indicated in those instruments that are not evidence. They are only admitted for the purpose of showing what was the mental state, what was going

on in the minds of the parties who were involved * * *. You are not to consider the statement as determining the truth or falsity of matters therein related." [R. 1030, 1031.]

The rule is clearly stated in Wigmore on Evidence, Volume VI, Section 1766, pp. 177-178.

"The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial or assertive use of human utterances and their non-essential use.

The theory of the Hearsay rule * * * is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted*, the Hearsay rule does not apply * * *." (Emphasis by the author.)

(3) The Time and Place of the Making of an Extra Judicial Admission Does Not Effect the Use of Admissibility.

Both appellant Edgerton and appellant Twombly point out that plaintiff's witness Webster testified that he had interviewed Twombly about the statement on July 9, 1940 and was told by him that it was the statement that he had given to Inspector Van Meter [R. 751; 774] and that in connection therewith the court instructed the jury that,

"there is no evidence before you as to when, after the defendant Twombly separated from said com-

panies, he wrote said statement, except as I have just stated" [R. 1031]

and further that the court instructed the jury that,

"as a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit: December 21, 1938 * * *." [R. 1032.]

(See Appellant Edgerton's brief, p. 97, and Appellant Twombly's brief, p. 33.) As stated heretofore in this brief as well as in our answering brief to appellant Edgerton, Plaintiff's Exhibit 216 was introduced as an admission against its maker appellant C. W. Twombly and at no time was it sought to be used as an admission of appellant Twombly against appellant Edgerton or any of the other defendants in the case. The court so instructed the jury [R. 1030] and particularly the court's instruction [R. 1023],

"* * * on the other hand if a conspiracy has come to an end either, by the accomplishment of the common design or by the parties abandoning the same, evidence of acts or declarations therafter made by any of the conspirators can be considered only as against the person doing such act or making such statement. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration."

The rule is well stated in 31 C. J. S., p. 1067, section 298, as follows:

"The time and place of the making of an extra judicial admission bear only on its weight and not on its

competency as evidence, except where it is sought to use the admissions of one person against another, in which case the time of the admission becomes material as bearing on whether the declarant, at the time of making this statement could by his statements, effect the party against whom the evidence is offered."

See also:

Marlenee v. Brown, 53 A. C. A. 929, 128 P. (2d) 137.

Appellant Twombly also makes mention of the fact that the statement contained in his admission, Plaintiff's Exhibit 216, was made after the consummation of all of the acts related therein and asks upon what theory could the document show the intent of appellant Twombly prior to the date on which it was written. (See Appellant Twombly's Brief, p. 32, lines 13 to 17.)

This question is answered by Wigmore on Evidence, Volume VI, Section 1732, p. 103, as follows:

"Statements *after the act*, stating the *past intent or motive* at the time of the act are of course admissible for him under the present Exception, though usable against the accused as admissions * * * but subsequent statements predicated *a then existing state of mind* are properly admissible under the present exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions. But they should be

equally admissible in his favor. In both cases the object is to ascertain his subsequent state of mind * * * and thence to infer his state of mind at the time of the act."

It is therefore obvious that the time and place of the making of the admission by appellant Twombly is not material.

Note: May we call the court's attention to a misstatement, no doubt inadvertently made by appellant Twombly in his brief on p. 34, line 5, which reads as follows:

"Now on this question of intent, if it is introduced for that purpose, it is not proper to introduce the whole document, regardless of where the chips may fall * * *."

The correct statement made by the court is as follows:

"The Court: Now on this question of intent if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall."

In other words, "It is not proper," should be corrected to read "Is it not proper." [R. 785-786.]

POINT III.

The Record Shows That There Is Substantial Evidence of Fact Which Excludes Every Other Hypothesis But That of Guilt.

The discussion herein is in reply to Point I of appellant's brief. The authorities cited by appellant Twombly under this point are elementary and no doubt contain a sound exposition of the law wherever applicable. However, in instant case, we believe the following chronological dissertation of the acts, conduct, and participation of appellant Twombly in the alleged scheme and artifice to defraud, as alleged in the Indictment, as reflected by the record, and as limited by the Government's Bill of Particulars, will completely clothe appellant Twombly with the garb of guilt with not one stitch of innocence apparent.

However, anticipating that the court will be interested in citations discussing and passing upon the legal propositions involved in appellees reply to this part of appellant's brief and the two succeeding points of appellant's brief, likewise discussed under this heading, we respectfully refer to the following cases:

The case of *Downing v. U. S.*, 35 F. (2d) 454, Ninth Circuit, at p. 458, cited by appellant Twombly in his opening brief, is so applicable to the case at bar, that we specifically call the court's attention to the following:

“* * * and until it is shown that he was participating in an enterprise, the object of which he knew, or should have known, was to defraud, and that if,

considering the circumstances, he honestly and reasonably believes the representations to be true, there is an absence of the requisite criminal intent. In short, it was essential that he act with knowledge of the falsity of the representations or with such recklessness as to imply a willingness to profit by the deceit."

Cochran v. United States, 41 F. (2d) 193 (8th Cir.), at p. 199, the Court said:

"* * * the question after all, is not whether or not Cochran or any of the defendants made money out of the scheme but whether they formed a scheme to defraud and in its execution, used the United States mails."

At page 199, the Court further said:

"* * * In considering this question, it must be borne in mind that the indictment charges the formation of a scheme to obtain money by false representations, and while the conspiracy count was dismissed, yet when such a scheme as is charged in this indictment is criminally participated in by more than one individual, it constitutes in and of itself a conspiracy. *Chambers v. United States* (C. C. A.), 237 F. 513, 524; *Van Riper v. United States* (C. C. A.), 13 F. (2d) 961; *Robinson v. United States* (C. C. A.), 33 F. (2d) 238, 241; *United States v. Herzog* (D. C.), 26 F. (2d) 487."

In the case of *Robinson v. United States*, 33 F. (2d) 238 (9th Cir.), at p. 240, the Court said:

"* * * Furthermore, a scheme to defraud, when shared in by several, becomes a conspiracy, and if a conspiracy exists in fact, the rules of evidence are the same as where a conspiracy is charged. *Belden*

v. United States (C. C. A.), 223 F. 726; Van Riper v. United States (C. C. A.), 13 F. (2d) 961. * * *

“* * * the civil doctrine that a person is bound by the acts of his agent within the scope of his authority has no application to criminal law, and that, if a person is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Here again the requested instruction entirely ignores the well established rules applicable to conspiracy cases.”

The Bill of Particulars herein very definitely limits the criminal acts alleged to have been committed by appellant and defendant Twombly prior to December 21, 1938. However, the Bill of Particulars also shows appellant's first connection with the activities of the corporations involved herein as of November 1, 1934, and we feel a chronology of the activities of appellant Twombly commencing November 1, 1934 and terminating December 21, 1938, will show him an active participant in the scheme or artifice to defraud and the using or attempting to use the United States mails to execute said scheme or artifice, as alleged in the indictment and found by the jury.

While appellee's brief in the Edgerton appeal in detail shows what had transpired and the present condition of the various companies or corporations involved herein as of November 1, 1934, when appellant Twombly aligned himself with the other defendants herein, we feel that a reiteration of the existing conditions of the companies or corporations as of November 1, 1934, would aid the court in following our contention that, although certain things had transpired previously to appellant Twombly's

connection with said defendants, the appellant Twombly thereafter adopted the scheme or artifice to defraud formulated by the defendants, and was active therein until his termination on December 21, 1938, and when he severed his connection, that all of the essential elements of said scheme or artifice to defraud had taken place and the United States mails had been used to execute or to attempt to execute said scheme or artifice.

On November 1, 1934, appellant and defendant Twombly assumed the general managership of the First Security Deposit Corporation [R. 408-409]. At this time eighty per cent of the assets of Railway Mutual Building and Loan Association previously had been transferred to First Security Deposit Corporation [Plaintiffs' Ex. 134; R. 336-337]; also R. F. D. Discount Company (later changed to Consolidated Investors) had been organized and the First Security and R. F. D. Discount Company were both actively engaged in purchasing at a discount the bonds and securities issued by First Security Deposit Corporation and delivered to former investors of Railway Mutual [R. 147, 161, 528].

It is our contention that while a temporary bridge had been created by the defendants prior to appellant Twombly's connection therewith, separating the legitimate from the illegitimate transactions involved herein, and that the defendants, other than appellant Twombly, had used said temporary bridge in going from legitimate to illegitimate transactions, and had planted the seeds of a scheme and artifice to defraud in said field of illegitimate transactions, that the creation of the Investment Finance Company was the "keystone" of said bridge which they felt made it more secure, and thereafter the appellant and defendant Twombly and the other defendants freely and

actively crossed over into said fields of illegitimate transactions and watered and cultivated the seeds of said scheme and artifice to defraud, and that during appellant Twomby's connection with and prior to his termination thereof of said First Security and Investment Finance Company, said scheme or artifice was brought to a full fruition, and the essential elements involved in the offense herein, to-wit:

- (1) the existence of a scheme to defraud; and
- (2) the placing or causing to be placed in the post office of a letter, postal card, or other available matter for the purpose of executing or attempting to execute said scheme;

were completed as alleged in the indictment and found by the jury.

The first signs of life of the Investment Finance Company occurred on August 21, 1935, at a regular meeting of the board of directors of the First Security Deposit Corporation [Plaintiff's Exhibit 18; R. 371-373], when the following action took place:

"The following directors were present:

Messrs. R. W. Starr,
E. C. Thomas,
A. R. Ireland,
Wm. Leffert,
W. S. Brayton,
C. E. Berry, and
C. W. Twomby.

"I am omitting a portion of the minutes:

'On motion of Mr. Barry, seconded by Mr. Twomby, and carried, it was resolved that:

Whereas, it appears to this Board of Directors that this corporation and its stockholders would be

benefited by having its liquid assets used in some active and profitable business, thereby returning a larger income to this corporation than is now earned by said assets, and

Whereas, it appears to this Board of Directors that the business of loaning money on personal property, especially under the provisions of the Personal Property Loan Brokers' Act of the State of California, is a safe, progressive and lucrative business to be engaged in at the present time, and

Whereas, it appears to this Board of Directors that it would be more practicable to engage in such business through the medium of a separate, corporate entity organized for the general purpose and that the organization of such corporation would be for the benefit of the stockholders and bond holders and creditors of this corporation,

Now, therefore, be it resolved that the Secretary be, and he is hereby, instructed to employ counsel and auditors and incur all necessary expense and take all necessary steps for the purpose of organizing a separate corporation to conduct a general finance business and more particularly, a business of loaning money upon personal property as security; said corporation to be capitalized at Two Hundred Thousand Dollars (\$200,000.00), with one class of common stock to be issued at a par value of One Dollar (\$1.00) per share; said corporation to be governed by a Board of Directors, five in number, and

Be It Further Resolved that said corporation shall be formed in the name of Investment Finance Company, and that the Secretary be, and he is hereby, authorized to purchase not to exceed One Hundred Thousand Dollars (\$100,000.00) worth of common stock of said corporation at such time and times as

he may deem necessary for the best interests of this corporation and the new one to be formed.’”

However, some intervening cause, not disclosed by the record, actuated the directors of First Security Deposit Corporation to invest only One Thousand Dollars (\$1,000.00) in said Investment Finance Company rather than One Hundred Thousand Dollars (\$100,000.00) [R. 287]. Unless, however, that intervening, unknown cause assumed shape and form when eventually the appellant Twombly and the other defendants, by, what we believe, an illegitimate acquisition of stock in said Investment Finance Company, wrested the control from said First Security Deposit Corporation—the First Security Deposit Corporation being the instrumentality pretended to be used to protect the former investors of Railway Mutual who had converted their holdings to those of the First Security Deposit Corporation [R. 288].

Another meeting of the board of directors of the First Security Deposit Corporation, held on November 20, 1935 [R. 373-374] may throw some light on this situation wherein the following proceedings were had:

“The following directors were present:

Messrs. R. W. Starr
E. C. Thomas
A. R. Ireland
Wm. Leffert
W. S. Brayton
C. E. Berry
C. W. Twombly.

“Skipping a portion here.

“On motion of Mr. Berry, seconded by Mr. Thomas, and carried, the Secretary was authorized to

loan to the Investment Finance Company, a sum or sums not to exceed \$50,000.00 and the Secretary refer the matter as regards the procedure involved in the handling of the said loan or loans to H. Dean Campbell for his opinion."

At this stage of our chronological survey of undisputed facts in evidence, as reflected by the record, let us record the official connection of appellant Twombly with the First Security Deposit Corporation and the Investment Finance Company before his termination on December 21, 1938, as set forth in the Government's Bill of Particulars herein.

"(a) As to First Security Deposit Corporation, the defendant Twombly was General Manager from on or about November 1, 1934 to on or about September 21, 1938. He was also Secretary of the First Security Deposit Corporation from on or about November 21, 1934 to on or about September 21, 1938. He was also a Director of said corporation from on or about December 1, 1934 to on or about December 21, 1938. He was a member of the Executive Committee of the said corporation from on or about February 19, 1936 to on or about September 21, 1938.

"As to the Investment Finance Company he was Secretary from on or about September 5, 1935 to on or about September 21, 1938. He was Treasurer from on or about September 5, 1935 to on or about March 7, 1939. He was General Manager to on or about September 21, 1938. He was a member of the Board of Directors from on or about September 5, 1935 to on or about December 21, 1938."

For the sake of argument we will concede that prior to appellant Twombly's connection with either the First Security Deposit Corporation or the Investment Finance Company, the First Security Deposit Corporation had completed the plan and reorganization agreement whereby eighty per cent of the assets of Railway Mutual had been transferred to First Security Deposit Corporation, and said First Security Deposit Corporation had deposited with the Metropolitan Trust Company \$1.10 of its assets for each \$1.00 of bonds issued by said First Security Deposit Corporation, and that among other things, said plan and reorganization agreement provided as follows:

"a new corporation has been organized under the laws of the State of California known as First Security Mortgage Company (later changed to First Security Deposit Corporation) the objects and purposes of the corporation being to loan or to advance money and to take as security therefor securities or property which shall be approved as an appropriate legal investment by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California and to operate a general savings and mortgage business," [R. 291-295; 314-315; 335; 657; 682-683. Plaintiff's Exhibits 131 and 133].

But we maintain that in view of the fact that appellant Twombly acted as general manager of the First Security Deposit Corporation from November 1, 1934 to on or about September 21, 1938, as reflected by Government's Bill of Particulars herein cited, it is reasonable to assume that he familiarized himself with the essential details of said plan and reorganization agreement, the very founda-

tion of said First Security Deposit Corporation, among which we quote the following:

“a new corporation has been organized under the laws of the State of California known as First Security Mortgage Company (later changed to First Security Deposit Corporation) the objects and purposes of the corporation being to loan or to advance money and to take as security therefor securities or property which shall be approved as an appropriate legal investment by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California and to operate a general savings and mortgage business,” [R. 291-295; 314-315; 335; 657; 682-683. Plaintiff’s Exhibits 131 and 133].

The record shows that for some time prior to appellant Twombly’s official connection with First Security Deposit Corporation, he acted as auditor of said company [R. 401, 402], and in his duties as auditor necessarily inspected the books and records of said corporation. Doubtless his work as auditor prompted the officials of First Security to offer him the general managership which he assumed on November 1, 1934.

Appellant and defendant Twombly in his opening brief attempts to characterize himself as an innocent victim in the alleged scheme or artifice to defraud and tries to justify his participation in said scheme or artifice by stating that he remained in his official capacities with the First Security and Investment Finance Company for the pretended purpose of protecting and guarding the interests of the investors of Railway Mutual (Appellants’ Opening Brief, p. 9, lines 21 to 25), who later became bondholders and stockholders of First Security. However, we do not feel the position taken by the appellant is consistent.

During the time appellant Twombly acted as general manager of the First Security, from November 1, 1934 to September 21, 1938, we assume that he drew a minimum salary of \$250 per month, the salary fixed by the board of directors of First Security when appellant Twombly was first employed [R. 409], and appellant admits in his opening brief that the First Security was organized for the pretended purpose of conserving, protecting, and guarding the assets of First Security, which assets represented hard-earned money of countless individuals unfamiliar with, and with no voice in, the affairs of said First Security. We fail to reconcile this position of appellant Twombly as the pretended protector of investors of First Security (Appellant's Opening Brief, p. 9, lines 21 to 25), with his active participation in the organization of Investment Finance Company, his official connection therewith, and the activities of said Investment Finance Company during the time appellant Twombly was connected therewith. Among one of the official acts participated in by appellant Twombly, as general manager of the First Security, was the organization of Investment Finance Company, which company when organized started operating on a little over \$1,000, the First Security having purchased \$1,000 of its capital stock [R. 372-373]. Almost immediately thereafter appellant Twombly again actively participated, as an officer of First Security, in loaning, without security, to Investment Finance Company \$50,000 [R. 373-374]. During appellant Twombly's connection with said First Security, it loaned, without security, to Investment Finance Company large sums of money. The loss suffered by First Security in its dealings with Investment Finance during appellant Twombly's connection therewith we feel was a fraud upon the bondholders

and stockholders, former investors of the Railway Mutual, and if the loss so suffered by First Security through the activities of Investment Finance Company had been preserved, protected, and guarded by First Security, the bondholders and stockholders thereof would have received practically one hundred cents on the dollar for their holdings.

Appellant Twombly's position in so far as defendant Cronk is concerned is likewise inconsistent. On the one hand he raises the question of agency, maintaining that he is not liable for the criminal acts of his agent Cronk, while on the other hand he attempts to exonerate himself from the acts of Cronk because he, appellant Twombly, was not present as a director when Cronk was employed by Investment Finance Company, and later voted to discharge Cronk (Appellant's Opening Brief, p. 15, lines 20 to 23). The decisions cited by appellant Twombly upon the question of agency, academically, correctly recites the law, but they are in no way germane to the case at bar, and we will not take up the time of the court to discuss them.

Appellant Twombly and defendant Cronk were both indicted as having been participants in a scheme or artifice to defraud and for using the United States mails in an attempt to or to execute said scheme or artifice to defraud and the burden was upon the Government to prove, beyond a reasonable doubt, that said appellant Twombly and defendant Cronk committed the acts as alleged in the indictment to constitute a scheme or artifice to defraud and that the United States mails were used to attempt to

or to execute said fraud. In so far as the defendant Cronk is concerned, the jury was not convinced that the acts performed by him alone connected him with or made him a party to said scheme or artifice to defraud as alleged in the indictment, but the jury did find that appellant Twombly adopted, and became a party to, said scheme or artifice to defraud and participated in using the United States mails to attempt to or to execute said scheme or artifice.

While the R. F. D. Discount Company was organized and operating previous to appellant Twombly's connection with either the First Security or the Investment Finance Company, and many of the activities of said R. F. D. Discount Company had taken place, including the Reed Bros. (Mortuary) trust deed whereby the treasury of the R. F. D. Discount became enriched to the amount of \$3,200, money rightfully belonging to the First Security Deposit Corporation for the benefit of former investors of Railway Mutual, which transaction is set out in detail in appellee's reply brief in the Edgerton appeal, we feel it is highly important to note appellant Twombly's activities on November 9, 1936, at which time appellant Twombly was a director of the First Security and a director of the Investment Finance Company; also at this particular time, the First Security controlled the Investment Finance Company. Now just what happened? At a meeting of the board of directors of Investment Finance Company held on November 9, 1936, with the following directors present: R. W. Starr, J. H. Edgerton, E. C. Thomas, C.

W. Twombly (the appellant herein), and J. L. Smale, the following activities were had:

“On motion of Mr. Thomas, seconded by Mr. Edgerton, and carried, it was resolved as follows:

‘Whereas, it appears for the best interests of this corporation that substantially all of the assets of the Consolidated Investors, a California corporation, be purchased by this corporation for a sum not to exceed \$36,000 in cash;

‘Now, Therefore, Be It Resolved, that the officers of this company be and they are hereby authorized to negotiate, enter into all necessary contracts with respect to, and execute any and all necessary instruments necessary to complete the purchase of substantially all of the assets of the Consolidated Investors, a California corporation, including the following securities:

‘3375 shares Common Stock of the First Security Deposit Corporation,

‘2331 shares of Class A Preferred Stock of the First Security Deposit Corporation, with a total par value of \$46,620;

‘827 shares of Class B Preferred Stock of First Security Deposit Corporation, with a total par value of \$16,540;

‘209 Full Paid Income Shares of the Railway Federal Savings & Loan Association, with a total par value of \$20,900 (said shares in the amount of 15,000 being subject to a hypothecation agreement with one F. E. Jones, said hypothecation agreement being guar-

anteed by R. W. Starr, J. H. Edgerton, A. R. Ireland, E. C. Thomas, F. A. Anderson and W. S. Brayton).'" [R. 377-378.]

Very soon thereafter a major portion of the funds received by the directors of Consolidated Investors as enumerated above (while those directors did not include appellant Twombly, they did include some of the directors of First Security) was used in purchasing stock of Investment Finance Company and wresting control of said company from First Security [R. 288]; and whatever profits accrued thereafter to Investment Finance Company, other than a very small amount of stock held by First Security, inured to the benefit of the stockholders of Investment Finance Company, including appellant Twombly.

The record will show that thereafter First Security, with appellant Twombly as an officer and director, loaned large sums of money to Investment Finance Company without security, of which company appellant Twombly was an officer and director. [R. 565-566.]

In answer to appellant Twombly's contention on page 59 of his brief that "there is no evidence to show that appellant ever converted any money or property of anybody under any pretense," see:

Butler v. United States, 53 F. (2d) 800, 804, 806 (10th Cir.).

IT IS NOT NECESSARY THAT ALL THE MISREPRESENTATIONS ALLEGED IN THE INDICTMENT BE PROVEN.

The rule is established by the following cases, that it is sufficient if the government proves the scheme substantially as charged but need not prove all of the misrepresentations alleged:

Levine v. United States, 79 F. (2d) 364 (9th Cir.), p. 369:

“Appellants assign as error the giving of an instruction that ‘It is not necessary that all the misrepresentations alleged in the indictment be proved, but at least some of them must be proved, as charged, to your satisfaction and beyond a reasonable doubt.’ This was a correct statement of the law.”

Also, see:

Havener v. United States, 49 F. (2d) 196 (10th Cir.), p. 199; cert. den. 284 U. S. 644;

Mathews v. United States, 15 F. (2d) 139 (8th Cir.), p. 143:

“The gist of the offense is the use of the mails in execution of the scheme to defraud. It is essential to prove the existence of the scheme. The scheme may be made up of many elements. If so, it is necessary to prove a sufficient number of the elements of the scheme, so that the jury may be justified in finding the existence of the scheme. But no particular element need be proven, if the other elements, when proven, are sufficient to establish the scheme.”

POINT IV.

The discussion of agency is covered under Point III hereof for the reason that in answering Point I of appellant's brief, we have interwoven the question of agency therein and it seems to fit perfectly in logical sequence, and we feel its elimination therefrom would break the continuity of the drama drawn from the activities of appellant Twombly in the alleged scheme or artifice to defraud, as alleged in the Indictment.

POINT V.

Appellee's argument under Point III we feel covers fully the argument advanced by appellant Twombly under Point II and reference is respectfully made thereto.

POINT VI.

Appellant Twombly's Joining the Enterprise and His Participation Therein Renders Him Liable for the Acts of the Other Defendants.

Appellant Twombly, in his brief at page 62 under the heading of "Erroneous Instructions," contends that the instruction given by the trial court [R. 1033], to-wit:

"If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants, other than the defendant Twombly, then you are at liberty to find that the defendants depressed and caused to be depressed

the market price of the securities of the First Security Deposit Corporation as alleged in the indictment. As to defendant Twombly, the plaintiff has limited, by his Bill of Particulars, the activity of that particular defendant, on this particular matter, only as to the bonds of the Company.”

is erroneous and ambiguous. In checking the record, we fail to find that appropriate objection and exception to the Court’s instruction was made. [See typewritten Bill of Exceptions of Appellant Twombly, pp. 473-476, and the Record, pp. 1035-1042.] After the Court gave the instruction to the jury, he made the following statement:

“I shall now ask counsel for the plaintiff if there are any objections to the instructions?

Mr. Campbell: “No objection, Your Honor.”

The Court: “Now, do counsel for the defendants wish to make any objections before the jury or would they prefer to have the jury retire for the purpose of making their objections?”

Then follows certain objections by Counsel Irwin in behalf of his clients, but no objection was made by counsel for appellant Twombly. [R.1036.]

Rule 1, Criminal Appeals of the Ninth Circuit Court of Appeals, provides as follows:

“(a) No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts.”

As stated in Housel & Walser, Defending and Prosecuting Federal Criminal Cases, page 618, Section 537:

“In general; necessity.

“In the absence of appropriate objection and exception, the refusal, omission, or failure to instruct the jury is not available on appeal. (Pera v. U. S., 11 F. (2d) 772; Frisch v. U. S., 17 F. (2d) 81.) Objections and exceptions to the charge are made at the conclusion thereof and before the jury has retired, thus permitting the Judge to correct it if he sees fit to do so. (Sevensma v. U. S., 278 F. 401.)

“The function of an objection is to point out with particularity to the Court and opposing counsel the alleged error, and give them an opportunity to correct it. An exception reaffirms the objection and preserves the point for the consideration of the appellate courts.”

However, we believe that an answer to appellant Twombly on this particular point will show that appellant Twombly's participation in the various activities, both by himself and the other defendants, renders him liable for the acts of all concerned.

It is to be noted that appellant Twombly in setting out the instruction of the court in his brief on page 62 has not set out its complete language, in that he omitted the last sentence, which is as follows:

“As to the defendant Twombly the plaintiff has limited, by his Bill of Particulars, the activity of that particular defendant on his particular matter only as to the bonds of the company.”

Appellant then attempts to place his interpretation upon the Court's instructions in which he states on page 63 of his brief:

"The Court either said one of two things, and the instruction is so ambiguous that we are unable to tell what the Court meant therefrom. Was the Court indicating that appellant Twombly had nothing to do with the causing of such 'a situation'. Query. Or was the Court indicating that Twombly might not have had anything to do with the causing of such 'a situation,' and yet could be found guilty if the other defendants had caused such 'a situation.' "

We believe that the instruction was not ambiguous. It is very clear that the court instructed the jury in effect, that if they found from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded, were not able to get as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants (meaning all of the activities of all of the defendants) other than the defendant Twombly whose activities have been limited by the plaintiff's bill of particulars to matters only as to the bonds of the company. In interpreting this particular instruction, we must keep in mind that the evidence shows that the persons alleged in the indictment as those persons intended to be defrauded were approached by the defendants to sell both their bonds and stocks at a reduced price, and, therefore because of the plaintiff's bill of particulars, any activity on the part of Twombly in that regard would be in connection with the bonds only.

However, assuming, but not admitting, that appellant Twombly's interpretation of the court's instruction is cor-

rect, in that the court thereby indicated that Twombly might not have had anything to do with the causing of such "a situation" and yet could be found guilty if the other defendants had caused such "a situation," the evidence in this case shows that appellant Twombly joined the enterprise and thereafter participated in many of its activities as heretofore shown [R. 147; 372-376; 541; 549] including the mailing of letters.

It is a settled rule of law that if there has been a joint contrivance or joint participation with the common purpose, the acts and statements of the one while engaged in carrying into effect the common purpose, are evidence against the other and further, persons joining an existing group engaged in commission of joint crimes assumes responsibility for all done theretofore. It was so held in *Belden v. United States*, 223 F. 726 (C. C. A. 9), at p. 730:

"One or two or more persons may devise a scheme or artifice to defraud, and the statute does not contemplate that, if two or more persons so devise a scheme or artifice, they shall be proceeded against as for a conspiracy to commit the offense denounced. While the government may prosecute for such a conspiracy as it sees fit * * *, yet it need not do so, and may prosecute for the simple offense denounced. In a prosecution for the simple offense, no overt act, as the term is understood in connection with the offense of conspiracy, is essential to be set up, but it must be made to appear that a letter or card, etc., has been mailed for the purpose of carrying into execution the scheme or artifice devised. In the one case the conspiracy is the gist of the offense, while in the other the misuse of the mails is the material thing denounced. * * * It is a common thing to have the

question arise whether one defendant is bound by the statement and acts of another, or of persons not even connected by indictment with the offense charged. And the constant ruling has been that, if there has been a joint contrivance or joint participation with the common purpose the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other and this without the necessity of alleged conspiracy in the commission of the offense. * * *

In *Chambers v. United States*, 237 F. 513 (C. C. A. 8), the Court said:

“Where two or more persons jointly devise and execute a scheme to defraud by use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter during the existence and execution of the scheme, done in a furtherance of that execution may become the acts of all the partners, * * *

In *Van Riper v. United States*, 13 F. (2d) 961 (C. C. A. 2), at page 967, the Court said:

“When men enter into an agreement for an unlawful end, they become *ad hoc* agents for one another, and have made, ‘a partnership in crime’ what one does pursuant to their common purpose all do, and as declarations may be such acts. They are competent against all. * * *.”

In *Silkworth v. United States*, 10 F. (2d) 711 (C. C. A. 2), one Gilbough was joined as a defendant under an indictment charging violation of Section 18, U. S. C. A., Section 338 (Criminal Code 215). Gilbough performed a

minor part in the final consummation of the scheme, but his conviction was affirmed, the Court saying at page 717:

"If his intent was criminal when he joined a dishonest enterprise he was part of the scheme. One man may form and accomplish it with or without assistance; but all who with criminal intent join themselves even slightly with the principal schemer are subject to the statute although they may know nothing but their own share in the aggregate wrongdoing. One man may render the scheme unitary, though he has the assistance of many others at different times."

See, also:

Alexander v. United States, 95 Fed. (2d) 873, 876 (C. C. A. 8).

POINT VII.

With reference to appellant Twombly's Point IV entitled "Motion to Strike," beginning on page 68 of his brief, appellee deems it sufficient to state that appellant Twombly was not prejudiced by reason of any of the alleged assignments of error contained therein; and, furthermore, the matters mentioned in said assignments of error have heretofore been covered, both in this brief and appellee's Answering Brief to appellant Edgerton.

Conclusion.

A study of the record will reveal that from the inception of the trial, until and including the trial court's charge to the jury, appellant and defendant Twombly was afforded a fair and impartial trial. In fact, time after time, the trial court, after long and extended (and, no doubt, exhausting to the court) argument between counsel for the

plaintiff and the defendants over disputed points of law involving the introduction of evidence, the Court very courteously, dispassionately, and without prejudice to defendant and appellant Twombly, made his ruling, keeping alive the limitations created by the Plaintiff's Bill of Particulars in so far as appellant Twombly was concerned and in the admission of evidence affecting defendants, other than appellant and defendant Twombly, the Court made plain to the jury, in simple and understandable language, not fraught with legal phraseology, the purpose of said evidence, stressing the point whenever evidence was admitted which was not to be used against appellant Twombly.

We do not feel that much emphasis should be put upon appellant Twombly's contention that the Court was discourteous, exacting, and unreasonable towards his counsel. This Court will recall that in the heat and intensity of a bitterly contested trial, such as the case at bar, involving many different personalities, that many irritating and immaterial matters arise and thoughtless remarks are made, but in nowise prejudicial to the parties involved. Counsel oftentimes, when working long hours and intensely concerned with the fate of his client in criminal cases, will let his imagination run rampant and give to innocent remarks the wrong interpretations. We feel again that appellant Twombly was in nowise prejudiced by the treatment afforded his counsel by the trial court.

We also feel that a careful examination of the record fails to show that appellant Twombly was prejudiced by the trial court's failure to give his requested instructions, and that there was no prejudicial error as against appell-

lant Twombly in the admission of the evidence as reflected by the record.

In the final analysis, the issues involved here are simple, and concern only two essential elements:

- (1) The existence of a scheme to defraud; and
- (2) The placing or causing to be placed in the post office of a letter, postcard, or other available matter, for the purpose of executing or attempting to execute the scheme.

The jury, laymen, and representing a cross-section, no doubt, of the average citizen, had only to weigh the evidence admitted, and keep their eyes upon and proceed towards the real objective, to-wit: Was a scheme and artifice formulated to defraud? Did appellant Twombly adopt and become a party to said scheme and artifice? Did appellant Twombly participate in the use of the United States mails to attempt to or to execute said scheme and artifice to defraud? all to the satisfaction of the jury beyond a reasonable doubt. The jury so found.

We respectfully submit that the judgment should be affirmed.

CHARLES H. CARR,

United States Attorney;

JAMES L. CRAWFORD,

CLYDE C. DOWNING,

MILDRED L. KLUCKHOHN,

Assistant United States Attorneys,

Attorneys for Appellee.

APPENDIX.

Mr. Campbell: I wish to read a few more minutes—I am reading from plaintiff's Exhibit 36, meeting of May 25th, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.'

Reading in part:

'On motion of Mr. Twombly, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk's employment be extended to June 1, 1938.'

Minutes signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Meeting of June 1, 1938.

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton and Mr. C. L. Cronk were present.'

Reading in part:

'On motion of Mr. Smale, seconded by Mr. Ireland, and carried, it was resolved that Mr. Cronk's employment be extended for two weeks.'

Minutes signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Minutes of June 15, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, Mr. Cronk's employment was extended until the next regular directors' meeting.

On motion of Mr. Ireland, seconded by Mr. Twombly, and carried, it was resolved that Mr. Cronk be paid at the rate of \$75 per month for automobile expense.'

Minutes are signed 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'

Minutes of July 20, 1938:

'The following directors were present:

Messrs. R. W. Starr

E. C. Thomas

J. L. Smale

A. R. Ireland

C. W. Twombly.

In addition to the directors, Mr. J. H. Edgerton was present.'

Reading in part:

'On motion of Mr. Thomas, seconded by Mr. Smale, and carried, it was resolved that Mr. Cronk's employment be extended for the period of one month.' Signed, 'R. W. Starr, Chairman; C. W. Twombly, Secretary.'" [R. 874-877]

No. 10136.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 10136.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

For the purpose of clarity, we wish to reply to Appellee's brief by discussing the statements and arguments contained in each portion thereof with reference to the title under which such statements and arguments appear in said brief.

We have presented in our Op. Br. an outline of the case and of the issues presented, and a full and fair statement of the evidence which is not challenged (Op. Br. pp. 2 to 47).

Appellee has entirely disregarded appellant's presentation of the facts and appellant's arguments upon the issue of the insufficiency of the evidence to support the verdict.

In our Op. Br. under the caption "The Facts in Evidence" we presented in the chronology of occurrence and subject matter a full and fair statement of all of the facts in evidence. This statement in no particular has been challenged by the appellee. We regret we find it necessary to challenge the verity of many of the appellee's statements as to the facts. Some of these statements of fact are diametrically opposed to the record in particulars that relate not only to our contentions that the evidence was insufficient but are of fundamental importance to other points raised in our brief.

Statement of Facts.

As we have seen, the Indictment charged only two false representations, *i. e.*, (a) that the First Security would invest only upon securities or properties approved as legal investments, and (b) represented the First Security was organized for the purpose of and actively engaged in the liquidation of the assets received by it from the Railway Mutual. We have asserted that there was not a scintilla of evidence that any representation (a) above was made to anyone (and in fact there was not). At page 87 of his brief appellee states "an examination of the record discloses at page 295, that plaintiff's Exhibit 131 'Copy of Plan, Agreement and Declaration of Trust for the Reorganization of the Railway Mutual Building and Loan Association,' contains the following language:

'Method of Reorganization * * * the objects and purposes of the corporation being to loan or to advance money and to take as security therefor se-

curities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California, and to operate a general savings and mortgage business.' ”

Exhibit 131 does not appear at page 295 of the record but appears in full at page 324 to 330. Likewise the above quotation does not appear in Exhibit 131. The cited language at page 295 comes from the document entitled “Copy of Plan, Agreement and Declaration of Trust for the Reorganization of the Railway Mutual Building & Loan Association” attached to the application of the First Security for a permit to issue its securities and is from the files of the official records of the Corporation Commissioner of the State of California [R. 93]. The defendants stipulated that Exhibit 9 could go in evidence [R. 166] and portions of this file were read in evidence at pages 168 to 194, 210-213, 291-314; the same quotation from Exhibit 9 (the Corporation Commissioner's file) mistakenly cited by appellee as appearing at page 295 of the record as a part of Exhibit 131 was also read into the record as part of Exhibit 9 at page 193 of the record. Exhibit 131 is referred to in our Op. Br. at page 13 as a brochure sent out by the Reorganization Committee under date of December 5, 1931. This was the initial document to the security holders of the Railway Mutual. In that exhibit it is recited that “original and duplicate copies of the Plan and Agreement are on file for inspection” at the Railway Mutual and headquar-

ters of the Reorganization Committee [R. 324-330]; there was no evidence that any one ever read or examined the same. We reiterate that neither in this initial document to the security holders of the Railway Mutual or any communication thereafter, either written or oral, was any reference made that the Plan and Agreement of reorganization stated the purpose of the First Security to be one of "loaning or advancing money and to take as security therefore securities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks," etc. Obviously this grievous misstatement of a cardinal fact could only be made by one not participating in the trial and who lacked familiarity with such a large record.

Again, at page 30, appellee without any record support mistakenly asserts that the defendants were "* * * flaunting to high heaven its original promise to investors of Railway Mutual to loan their money only on security or property * * *" etc., concerning which there was not a scintilla of evidence.

Again at page 4 of his brief appellee referring to Exhibit 9 (Corporation Commissioner's file), states: "In that Plan appears the statement wherein and whereby it was represented to the security holders that the new company was being organized for the purpose to loan or advance money and to take as security therefor securities or properties which would be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations of the State of California." As we have seen above no such representation

was ever communicated to any person either orally or in writing. The Plan itself contained many other provisions granting extremely broad powers; these powers were so broad that all that was done by the managers of the Plan and Agreement found authorization therein (Op. Br. 8-13). In support of the immediate above quoted portion of appellee's brief he cites record pages first, R. 291-295; this is from Exhibit 9 of the Corporation Commissioner's file, and contains the reference to the organization of the First Security regarding it loaning money on securities approved as legal investments. His next record reference is R. 314-315; this relates to the stipulation that the Plan and Agreement became effective but that it was not signed by the various depositors. The next record citation, R. 332, which is Exhibit 132, a letter under date of December 10, 1931, from the Reorganization Committee to the investor members of the Railway Mutual. This letter contains no such representation as asserted above by appellee that the First Security would loan money only upon approved legal investments. The next citation of the appellee is R. 335, and relates to Exhibit 133; this likewise contains no such representation. It is merely a recommendation by the full board of directors of the Railway Mutual, under date of December 15, 1931, to the members of the Railway Mutual to deposit their securities. The next record citation is R. 659; this refers to the testimony of the witness Tallamantes. This witness did not testify that she had read the Plan or that a representation as above had been made to her either orally or in writing. There is no evidence that the Plan itself

was ever circulated. Exhibit 131 was a brochure inviting investors to deposit their securities; but this exhibit contains no representations whatsoever concerning the nature and character of the proposed business purposes of the First Security being to loan money only on legal investments. This witness was asked:

“Q. Mrs. Tallamantes, as guardian of your son, Jack Winston, did you have submitted to you a plan from the reorganization committee of the First Security Deposit Corporation inviting you to accept their plan and exchange your securities, which you then held in the—

Mr. Adams: Objected to as leading and suggestive
* * *

The Court: Well, it is a preliminary question.

Q. In which there was submitted to you a plan by the reorganization committee of the First Security Deposit Corporation? Was there such a plan submitted to you * * * A. I *think* there was a printed plan.

Q. Mrs. Tallamantes, I will ask you if you exchanged your securities * * * after there had been submitted to you the plan which I just asked you about. A. I think I did, I am a little hazy about it. I have seen the plan before that * * *

Mr. Lawson: I thought counsel was going to follow that up and show us what the plan was. Now he says you have seen a plan. What is the plan? I don't know what he refers to.

The Court: You can't try his case * * * He has asked for a plan and she said 'yes.' * * *

Mr. Irwin: * * * might that question where she was asked about the plan, if she received the plan—might it be considered stricken? There are several objections that—might be interposed, that it calls for a conclusion * * * and not the best evidence * * *

The Court: When you said, 'the plan,' you are referring to any particular plan, or just a plan of reorganization?

The Witness: Just a plan of reorganization.

The Court: The objection will be overruled. Exception." [R. 658-660.]

The next record reference of appellee is R. 682-683, and refers to the witness Morse. All he testified to was that he had received a document similar to Exhibit 131. As we have seen above Exhibit 131 contains no representation concerning the First Security loaning money only on approved legal investments.

At page 3 of the Statement of Facts appellee states that "* * * in 1931 the Railway Mutual had assets aggregating \$2,300,000.00." There was no evidence of any appraisement of the assets or of value of specific assets and all of the figures given as to assets were merely figures of book value. This is true as to all companies.

At page 4 appellee states that appellant Edgerton was General Manager and counsel "during the greater portion

of the existence" of the First Security. Mr. Edgerton did not become identified in any manner with the First Security until long after the formulation of the Plan and Agreement and exchange of securities. Representations made with respect to the nature and character of this Plan of reorganization, the securities of the depositors of the Railway Mutual exchanged for those of the First Security, occurred long before Mr. Edgerton became attorney for the company. Mr. Edgerton was not a Director of the company, had no common stock interest in it at any time and only became a minor preferred stockholder in 1939 when jointly with his wife he had 579 shares out of a total of 12,605. Mr. Edgerton did not become general manager until October 19, 1938. The time and extent of his identification with the First Security appears in our Op. Br., at pages 19-22, with supporting record pages.

At page 4 appellee states that on September 10, 1932, there was filed with the Corporation Commissioner an application for a permit on behalf of the First Security "at which time defendant stated to the Corporation Commissioner that the Railway Mutual Building and Loan Association was a completely solvent institution." The attorneys filing the document were "Haight and Trippett, by Oscar A. Trippett, Attorney for Applicant" [R. 192]. It was many months later that Mr. Edgerton on behalf of the law office of Paul Nourse acted as counsel for the First Security.

At page 5 appellee asserts that the defendants transmitted a proxy form to depositors of the Railway Mutual

and cites record page 675. This is Exhibit 187, a letter to the witness Grace Benn, dated November 15, 1932, enclosing a form, Plaintiff's Exhibit 188, which contained a proxy to the defendants Starr, Smale and Thomas. This occurred a long time before Mr. Edgerton became identified in any manner with First Security.

At page 5 appellee asserts "By obtaining depositor's voting proxy, defendants were able to keep, maintain and control the First Security, etc.,," and refers to the above Exhibit 188 and record pages 622 to 625. The record citation refers to Plaintiff's Exhibit 46 [R. 618] which is the report of the accountant Campbell, containing certain schedules among which is schedule 4 [R. 622] which refers to a pledge agreement concerning certain California Federal Savings securities owned by the Investment Finance in connection with which 16,526 shares of the Investment Finance was deposited as security; of this number of shares the schedule shows 1,166 were hypothecated and assigned by the appellant Edgerton. Exhibit 46 was not admitted as evidence as to the truth of the statements contained therein [R. 620-621].

At page 6 of his brief, appellee referring to the Realty Deposit Company, a subsidiary department of the First Security, which had a two-fold purpose, *i e.*, to purchase First Security bonds at the market value similarly as other building and loan associations were doing and to sell real estate, both its own and of other concerns (Op. Br. 23), asserts that the method of operation of the Realty Deposit was suggested by Mr. Edgerton, a letter dated Jan. 2, 1934. The method used by this subsidiary de-

partment permitted a party buying real estate to turn in bonds as consideration for the real estate or when the company sold for cash it would use these funds and buy in the open market its own bonds to offset the loss usually sustained in cash transactions by the profit made through the purchase of bonds at the prevailing market price. These bonds so purchased were then sent to the Metropolitan Trust Company for cancellation thereby reducing the outstanding obligations of the First Security (Op. Br. 24). The letter does not bear out the assertion that this method was suggested by Mr. Edgerton. The letter in question was one from the law office of Paul Nourse (Mr. Edgerton's employer) and recites "From our conversation the other day, it is my understanding that *you contemplate authorizing* the Realty Deposit Company which is a subsidiary department of the First Security * * * to purchase bonds of the First Security at their market value." This concept of the Realty Deposit Company was of the management itself and not Mr. Edgerton.

At page 6 appellee refers to a real estate transaction that the appellant Edgerton had had with the First Security in keeping with the above outlined method. Among other things appellee asserts that this real estate transaction took place in *March* of 1934 and that "after holding the property for approximately one year Edgerton sold it for \$4500. cash." Neither appellee's record citation nor anywhere else in the record does it appear that Mr. Edgerton ever resold this property, much less that he sold it for \$4500. Appellee also asserts that Mr. Edgerton at the time was on the Board of Control of the Realty

Deposit. Appellee then reasons from the fact that the First Security furnished its bonds which it had acquired from the public for \$2206.64 in connection with this transaction and that Mr. Edgerton paid in cash to the First Security \$2021.29, that he thereby caused the First Security to sustain the small loss of \$185.35. The record discloses that Mr. Edgerton absented himself from the meeting of the Board of Control on November 3, 1933, when it acted upon the offer he had previously made to the department manager and at a time prior to the establishment of the Realty Deposit Company [R. 635]. The matter before the Board of Control at this meeting that Mr. Edgerton absented himself from shows that he originally proposed to pay in bonds which was changed to an offer in cash. The recommendation of the manager of the department was that they accept the cash offer "and supply the bonds necessary which we will be able to do not to exceed \$2000" [R. 636]. Actually the transaction was not concluded until April 24, 1934, at which time Mr. Edgerton was not a member of the Board of Control of the Realty Deposit [R. 636, 272]. The evidence shows that there was a profit of \$215.37 on the part of the First Security in connection with this piece of real estate and that the sum of \$215.37 was a credit item [R. 638-640].

Early in 1933 the First Security wrote to its bond-holders: "Among the advantages accruing to the new company following the separation of assets will be; * * *. The rapid liquidation of repossessed properties through exchanges for bonds and a corresponding de-

crease in outstanding obligations" [R. 345, 347-348]; and shortly after the segregation of assets "now the re-organization is an accomplished fact and the assets segregated, your company is better prepared to appraise its assets and outstanding obligations * * *. * * * we expect to find ourselves in a position to present a plan for the exchanging of properties for bonds to all those who care to take advantage of such arrangement. Every courtesy will be extended investors to help them select suitable properties * * * a real estate committee was recently appointed and a vigorous campaign is now being carried on for the disposal of these properties which will materially reduce the tax drain and the expense of supervision and upkeep." [R. 358, 359, 360.]

The above real estate transaction is the only one Mr. Edgerton had with the company. At best it is but an isolated transaction not within the allegation of the indictment and constitutes no proof of the charge. The indictment alleges that the defendants "under the pretense of loans, * * * did convert and divert to their own use * * * money and property of the * * * First Security." This transaction was as we have seen no different than other transactions between the First Security and the public.

At page 7 Appellee quotes from a letter of June 30, 1934 to the Corporation Commissioner, signed by Mr. Edgerton, as attorney for the First Security. This is a five page letter. Appellee quotes the sentence: "The company does not resell any of its bonds on the open market, or received on any real estate transaction, to any other

person for any price. The bonds once received by the company are immediately sent to the Metropolitan Trust Company for cancellation thereby reducing the outstanding liability of the corporation.” Appellee then asserts that “Mr. Edgerton had engaged in that very kind of transaction.” There is no evidence that the bonds once received by the company were not sent to the Metropolitan Trust for cancellation. At best the matter of bonds involved in this single isolated real estate transaction of Mr. Edgerton’s with the First Security Company was only a bookkeeping entry on the books of that company [R. 638]. As stated there is no evidence that the First Security bonds as acquired were *not* sent in for cancellation to the Metropolitan Trust Company in accordance with the above letter of Mr. Edgerton’s. The above quoted sentences are immediately followed by a long paragraph reciting up until two months previous transactions were “entered into whereby money might be received by one party, bonds from another, and a deed put into escrow from the corporation, the money going to the party selling the bonds, the deed going to the party putting up the cash and the bonds coming to the corporation. * * * Upon the recommendation of H. Dean Campbell, C. P. A., and this law firm, this practice was discontinued by the corporation. At the present time, therefore, as stated above, the only methods by which bonds reach the corporation is by direct purchase from stock brokers on Spring Street and when once purchased they are immediately cancelled by the Metropolitan Trust Company. The company has never made it a policy of

selling its own bonds at any profit. * * *” [R. 321-322]. There is no proof that the policy of the company in this regard was contrary to the above statement to the Corporation Commissioner.

At page 8, Appellee referring to the liquidation of the Reed Brothers Mortuary trust deed, which was consummated by March 26, 1934 [R. 499], asserts, “Finally Edgerton approached Reed and suggested that if Reed could raise \$22,000.00 he could refinance his trust deed through the R. F. D. Discount Company,” and cites record page 502. *The record is just to the contrary* [R. 503].

At pages 8 and 9 of his brief appellee deals with Reed Brothers—R. F. D. escrow which resulted in the R. F. D. receiving \$4,200.00, out of which sum Mr. Edgerton received \$1,000.00 in fees for legal services rendered R. F. D. (Appellee’s Br. 32). In connection with this transaction \$47,744.47 of bonds of the First Security were surrendered for cancellation to obtain the reconveyance of the Reed Brothers Mortuary trust deed, which had been in default for many months both as to principal and interest. The amount due on this trust deed was \$43,938.38. The R. F. D. had entered into an agreement with the Reed Brothers Mortuary which recited that it was in a position to exchange bonds of the First Security for a reconveyance of the Reed Brothers deed of trust and agreed to cause this to be done; the Reed Brothers agreed to pay \$22,000.00 into escrow which was to be disbursed to the R. F. D. upon a reconveyance of said deed of trust. Thereafter the R. F. D. made an offer

to First Security of \$17,800 cash for the Reed loan [R. 473 *et seq.*]. In connection with this transaction First Security supplied a portion of the bonds and the stockholders of the R. F. D. the remainder [R. 545-546, 242]. Subsequently the bonds supplied by the R. F. D. stockholders were replaced by other bonds of the First Security [R. 546]. Appellee is inaccurate when he says that all of these bonds were supplied by the First Security. This transaction occurred in 1934. During 1934 the First Security acquired upwards of \$400,000.00 of its bonds at an average rate of 34% of their face value. The actual cost of the \$47,744.47 of bonds to the First Security was \$15,133.10 [R. 529]. These bonds deposited with the Metropolitan Trust were cancelled, thereby reducing the obligations of the First Security by \$47,744.47. The cash price received for the \$43,938.38 trust deed represented a cash profit of about \$2,800.00 to the First Security plus a bond profit of the difference between \$43,938.38 and \$47,744.47. Appellee is entirely inaccurate in his statement that the First Security sustained the loss of \$26,000.00. The only question of impropriety is the receipt by the R. F. D. of \$4,200.00 for developing and negotiating the deal and in supplying only a portion of the bonds used to make up the required amount of bonds at the ratio of 10% in excess of the book value of the asset withdrawn. This is the only single transaction of its kind in the record. It is an isolated transaction. The charge here is, of course, not the question of the impropriety of this transaction, but whether or not "the defendants * * *

under the pretense of loans, * * * did convert and divert to their own use * * * money and property of the First Security."

At page 9 Appellee asserts without any record citation that "The \$3,200.00 received by the R. F. D. was divided among ten persons including Appellant Edgerton and certain other defendants as a stock credit in the R. F. D. The \$3,200.00 was then deposited in a bank to the account of the R. F. D. Discount Company. It was the working capital in cash of that company." There was no proof that the \$3,200.00 realized by the R. F. D. Discount Company in this transaction was its cash working capital or that the \$3,200.00 was divided among certain persons including Mr. Edgerton "as a stock credit in the R. F. D." The record discloses that the ten incorporators of the R. F. D. applied for permit on March 22, 1934 to issue to each of them respectively certain amounts of stock of the R. F. D. in exchange for certain securities and/or securities and cash [R. 846]. In the instance of the defendant Starr, he subscribed for 7,500 shares of R. F. D. in exchange for certain shares of stock and securities. The escrow holder under the permit reported to the Corporation Commissioner on July 20, 1934, that he held for Mr. Starr 7,500 shares of R. F. D. stock [R. 242-243]; for these shares of R. F. D. stock Starr had exchanged other specifically named stocks and securities [R. 847]. The same situation existed with respect to the other incorporators, who subscribed for 7,500 shares of R. F. D. stock for which they paid for in full with the stocks

and securities they held in other companies. As to the defendant Ireland, he subscribed for 7,500 shares and exchanged therefor stock and securities in the First Security for all but 112 shares; his subscription provided for \$112.00 cash for the balance [R. 847]. The report of the escrow holder shows as of July 20, 1934, 7,500 shares in his name or that of himself and a joint tenant [R. 242]. In the instance of Mr. Edgerton's subscription he was to receive 151 shares of R. F. D. stock in exchange for certain stock and securities and 520 shares of R. F. D. for services rendered the R. F. D. and the balance was to be paid in cash. The escrow holder reports that as of July 20, 1934 Mr. Edgerton and his wife as joint tenants had only 991 shares [R. 848, 242]. The record is silent as to how this slight increase from 671 shares of stock in the R. F. D. was paid for. As to the amount of cash received by the R. F. D. at the rate of \$1.00 per share the record is also silent. The aggregate shares of R. F. D. issued and outstanding as of July 20, 1934 was 33,566, according to the escrow holder's report to the Corporation Commissioner; as of November 5, 1935, 34,787 and on March 10, 1936, 35,957. Of this later amount there was an aggregate of 1,666 shares in the name of the Appellant Edgerton and/or his wife [R. 242-244]:

Next Appellee states at pages 9 and 10 of his brief: "Subsequently in December of 1936 the R. F. D. Discount Company was dissolved and its assets, which consisted of the defendant's First Security Deposit Corporation holdings—which had been bought at a discount from the

public and had been converted by defendants in R. F. D. stock at 100%—were sold in 1937 to Investment Finance Company for \$36,000.00 cash on the same basis, thus permitting defendants as R. F. D. stockholders to obtain full face value for their First Security Deposit stock and bonds while other holders thereof were being asked to sell at a discount [R. 161, R. 547-567; Plaintiff's Exhibit 36]." The above constitutes a gross misstatement of fact. The assets at the time the R. F. D. was dissolved did not consist exclusively of First Security Discount Corporation holdings [R. 550]. Likewise there is no evidence that the defendants bought any of their holdings in the First Security, which were exchanged for stock in the R. F. D., at a discount from the public [R. 847]. The evidence is that the defendants, with the exception of Appellant Edgerton had long been officers and directors and security holders of the First Security's predecessor, the Railway Mutual, and obviously must have purchased their securities in the Railway Mutual during its halcyon days of the nineteen twenties. As to Mr. Edgerton the evidence is that he received \$151.00 of par value R. F. D. shares in exchange for collateral trust bonds and one preferred share of stock of First Security [R. 848]. The evidence with reference to the \$36,000.00 paid in 1937 by the Investment Finance to the R. F. D. is that the defendants did not receive and retain this money. As the money was received by the R. F. D., it paid the same to the various stockholders on a *pro rata* basis, the distribution being "Upon dissolution at rate of \$1.00 per share", this money in turn was re-

transferred to the Investment Finance Company and deposited to its account. The appellee Edgerton received a check in the amount of \$1,666.00 from the R. F. D. and endorsed the same over to the Investment Finance Company [R. 143-156, 149]. The ultimate net result of this transaction was that the Investment Finance kept its cash and acquired all of the assets of the R. F. D.

Out of the many thousands of shares of stock of the First Security the Appellant Edgerton had none until 1939 and then only 579 shares [R. 281, 285, 286].

Appellee again refers to the sale of the R. F. D. assets to the Investment Finance at page 11 of his brief, asserting that the monies paid for the assets "represented a profit" to the defendants and cites record page 143. As we have seen this money did not represent a profit to the defendants and appellee's record citation only refers to the stipulation that the \$36,000.00 paid by the Investment Finance for the assets of the R. F. D., was "in turn retransferred to the Investment Finance Company and deposited in the account of the Investment Finance Company." Counsel then asserts at page 11 that the defendants used their share of the \$36,000.00 to acquire stock in the Investment Finance Company citing record page 143. Although this record citation does not support appellee's statement there is evidence that the stock register of the Investment Finance Company reflected stock issued in the names of several stockholders of the R. F. D. in amounts of approximately the equivalent of the amounts of the checks transferred to the Investment Finance (in 1937) and that the stock was issued shortly after such transfer of the checks (Op. Br. 44). Appellee asserts also at page 11 that during the period of the corporate

existence of the Investment Finance, the First Security loans of cash and assets to the Investment Finance was \$450,946.39, of which a balance was due after repayments of approximately \$250,000.00 as of March, 1940; also that as of August 18, 1937, and thereafter, of 31,398 shares outstanding of the Investment Finance there stood in the defendants' names an aggregate of 20,791 and of this aggregate amount 2,109 shares stood in the name of the Appellant Edgerton. The loans to the Investment Finance Company of money and assets in book value had reached approximately its high point at a time when the First Security was the sole owner of outstanding stock of the Investment Finance Company (Op. Br. 28-29). The original plan and agreement authorized changes and departures therefrom in doing business; the powers granted authorized the organization of new companies, participation therein by the First Security and permitted the First Security to alter and change its method of doing business (Op. Br. 10-13). *That such powers existed is not challenged by the appellee.* There is no evidence whatever that the Appellant Edgerton, or any other defendant, profited by reason of any stock interest in the Investment Finance or that any of the funds of the Investment Finance were diverted to the defendants (Op. Br. 32). Upon dissolution of the Investment Finance Company in August of 1940 all of the assets of the Investment Finance were transferred to the First Security. The assets so transferred were "\$266,723.76" (Op. Br. 27). The ultimate net results of the defendants' stock interest in Investment Finance was just zero. Appellee complains that what was wrong about this situation lay in the fact the defendants stood in the theoretical position after August, 1937, to participate in the profits, if any, of the

Investment Finance. This, however, is not the offense charged in the indictment.

On page 12 appellee states that the defendants through the Investment Finance Company represented to security holders of the First Security that it was organized for the purpose of liquidating the assets it received from the Railway Mutual. By implication Appellee concedes our position that no representation was made to the security holders of the Railway Mutual that the First Security was organized for any such purpose as charged in the indictment (Appellee's Br. 2). The allegation in the indictment to which appellee apparently addresses himself at pages 12 to 14 of his brief is one that charges that the defendants *falsely* "at all times represented * * * that First Security * * * was organized for the purpose of * * * and actively engaged in the liquidation of the said assets received by it from the Railway Mutual" (Gov. Br. 2). References to liquidation occurred many years after exchange of securities had taken place between Railway Mutual and First Security (Op. Br. 38, 70); and even though a representation was made that the First Security was organized for the purpose of liquidating the assets received by it from the Railway Mutual approximately six years after the Plan, Agreement and Declaration of Trust had been executed is unimportant. It is not a question of whether representation was made that it was organized for any such purpose, but whether or not they *falsely* represented that they had been actually engaged in liquidating these assets. The appellee offered no evidence whatsoever that the First Security was not engaged in liquidating these assets. The evidence discloses that progressively over the years these assets were being and had been liquidated (Op. Br. 40-41, 24).

The representations made regarding liquidation alluded to by appellee were those made by the acquitted defendant, Charles L. Cronk. Of the total amount of \$1,599,-643.33 book value of assets transferred from the Railway Mutual to the First Security title to \$1,425,264.39 of these assets was vested in the Metropolitan Trust Company under the Plan of Reorganization (Appellee's Br. 24). The Trust Agreement provided that an asset in the Trust Agreement could only be withdrawn therefrom when bonds were surrendered for cancellation in an amount of 10% in excess of the book value of the asset [R. 505, 182]. The appellee does not challenge that most of the obligations of the First Security had been retired, and that most of the assets of the trust had been liquidated at the time Mr. Cronk was employed in July, 1937. The charge, of course, is one of defrauding investors out of their money and property by means of false and fraudulent representations. The representations regarding liquidation were made only in connection with inducing holders of securities of the First Security to sell the same to the Investment Finance. There was no evidence that any security holder was defrauded by reason of such representation. The plaintiff utterly failed to show that any of the securities so acquired by the Investment Finance during the period that the representation was currently made were ever acquired at less than market price. What evidence there was on the subject of market price showed that these securities were acquired by the Investment Finance at not less than the market price (Op. Br. 36-38).

Appellee at page 13 of his brief sets forth a series of representations which he classifies as "other misrepresentations". The first is: "Probably by holding the bonds until 1942 when they would become payable, that possibly

we wouldn't be able to realize the amount of the bonds" [R. 684]. This is lifted from the testimony of witness Morse who testified the acquitted defendant Cronk made this oral statement to him. This, of course, is nothing but the expression of an opinion. The conversation in which the above quoted statement was made occurred in the summer of 1937 [R. 683-684]. This witness on maturity received the full face value and interest of his bonds from the First Security [R. 695-696]. Second: that "such amount of the assets have been deposited to the extent that the income has been cut down where it is insufficient to meet the monthly operating overhead." The word "deposited" in the quoted sentence should read "disposed" [R. 707]. This is a communication from the Investment Finance Company by Mr. Cronk to the witness Biddleman, dated July 27, 1938 [R. 705]. The above is a portion of a sentence; what Mr. Cronk did state was that the above was his "understanding" [R. 707]. What Mr. Cronk said was: "In my opinion, the thing for you to decide is whether it would be to your advantage to cash these bonds at eighty cents or wait that length of time with the chance of realizing any more out of what is left of the assets after more than one million dollars worth of assets has been liquidated. It is my understanding further that such an amount of the assets, (then continues above quoted portion)." There was no evidence that the assets had not been disposed of in such an amount that the income had been cut down where it was insufficient to meet the monthly operating overhead. Neither is it charged as a false representation. Appellee merely asserts that this as well as the foregoing representation was false without showing wherein it was false. This witness sold his bonds which

were due in 1942 to the Investment Finance Company at 80¢ on the dollar in October, 1938 [R. 706-707]. Bidelman testified that he "took the matter of the sale of his securities (under consideration) for two or three months" when Mr. Cronk approached him and discussed the sale of his securities. He told Mr. Cronk, "I don't do business that way. * * * I get it through the banks * * *" [R. 718]; that he only "discussed the matter" with "the banks" * * * "I took it up with the bank in Little Falls" [R. 716]. Third: That "You can obtain \$830.25 for your bonds now or wait approximately six and a half years and take your chances on obtaining more out of what is left of the assets after \$900,000. has already been liquidated." This is a letter of the Investment Finance Company, by Cronk, to the witness Taylor, in January 1938 [R. 801]. The offer related to two bonds in the face amount of \$1186.06. In October of 1938 he sold these bonds to the Investment Finance Company for \$1008.16 [R. 800]. There was no evidence whatever in the record that as of January 1938, \$900,000. of the assets had not already been liquidated. As of January 1938 these bonds, which had a face maturity date of Nov. 1st, 1942 also had an 18 months extension clause which would permit maturity date to be extended to May 1st, 1944 [R. 800, 231, 335]. Fourth: That "They were (First Security Deposit) in a bad condition and practically on the verge of bankruptcy and that the securities were not worth a lot of money." This is an excerpt from a sentence of the testimony of witness Walker. The remainder of the sentence

was “* * * but they could take care of them at some kind of a price for us, and he stated a price that didn't satisfy us; so we didn't sell the bonds. The price he offered us at that time was less than 80 cents on the dollars.” He attributes the foregoing statement to the defendant Twombly. This conversation occurred in May or June of 1937 [R. 744]. In October of 1938 he was paid 85¢ on the dollar for his two bonds aggregating \$813.21 by Mr. Cronk [R. 748, 744]. There is no charge in the Indictment that the defendants falsely represented that the First Security was on the verge of bankruptcy. The fact is that there was no proof of knowledge on the part of the appellant Edger-ton or any of the other defendants that this or any of the so-called “other misrepresentations” were ever made by the acquitted defendant Cronk or Twombly. Fifth: That “inasmuch as the company is right on the verge of a breakdown”. This also is an excerpt from the testimony of the witness Walker, who testified he had another conversation with the defendant Twombly in the middle of 1937, in which Twombly said “at that time he told us practically the same thing as in the first conversation; that things were looking bad; he told us that inasmuch as the company was right on the verge of a breakdown, or he told us that he could give us around what he offered us before, may be a \$1.00 or more: he says ‘That is about all, we can't give you any more than that.’ We did not accept the offer.” Also appellee states “That the Company was on the verge of a collapse.” This likewise is lifted from a sentence from the same witness. The wit-

ness testified that acquitted defendant Cronk said "he told us what we were going to do about the disposing of our bonds and he told us that the company was on the verge of a collapse and he wanted to get the business straightened up for them, then he made us an offer. We did not accept the offer." None of the foregoing is charged as a false representation and there was no proof of knowledge on the part of the other defendants that any such representation was made. Sixth: That "the affairs were going through a procedure of receivership; and the affairs usually operated at a loss to the stockholder; the funds were used up by the expenses of the receivership * * *." This is an excerpt from the testimony of the witness Robertson, concerning a conversation he had with the witness Cronk. This witness testified that he sold his securities at a price of 86 $\frac{1}{3}$ ¢ on the dollar [R. 740]. This witness further testified on Cross-Examination "Mr. Cronk didn't say it was above the listed price at that time, but it was above the price that it had been listed prior to that time;" [R. 741] * * * "He told me that that price which he offered was as good a price as he could get for my securities from any other source; I think that that was the price that was listed. I don't remember that he said it was a better price than I could get from any other source * * * However, different brokers would send me a card sometime listing what the price of it was. The price he offered me was just about the same as these brokers. I wouldn't be able to say whether the price he offered was a little bit better than the price offered by the

brokers" [R. 742]. When asked on Cross-Examination to tell everything that Mr. Cronk told him about receiverships he answered " 'You probably are familiar with receiverships, and if you are, you know something of how the funds go, that the expense of the receivership generally takes a big share of the funds.' I had had some experience; that part of Cronk's statement was a correct statement" [R. 742]. This witness had conversations with Mr. Cronk late in the fall of 1937 and August 1938 [R. 738, 743].

The appellee concludes his so-called statement of facts on page 14 with the assertion that the evidence showed that the Investment Finance Company would sell bonds it acquired at a discount to the First Security at 100% of their face value and that on these bond transactions the Investment Finance Company made a profit of approximately \$63,217.24. In support of this statement he cites Record page 540. There is no evidence that the Investment Finance sold the bonds it acquired to the First Security. The evidence is that the First Security loaned money and assets at book value. The assets borrowed were trust deeds, real estate, etc., and these were charged to the account of the Investment Finance at the book value at which the First Security carried them on its books. The valuation of the assets as carried on the books of the First Security was transferred and added to the indebtedness of the Investment Finance to the First Security (Op. Br. 28). While a portion of the bonds

acquired by the Investment Finance Company at a slight discount from holders thereof and credited by the First Security at their face amount in payment of interest and indebtedness, it is inaccurate to state that thereby a profit resulted to the Investment Finance in the amount of \$63,217.24. The figures cited is the difference between what the Investment Finance paid for bonds of the First Security and their total face value of \$240,929.99. As a matter of fact, the so-called accrued theoretical profit of \$63,217.24 was ultimately merged in the assets of the First Security by the transfer of all of the Investment Finance Company's assets to the First Security.

Appellee in his statement of facts then argues this theoretical profit of \$63,217.24 accruing to the Investment Finance "was a profit by which these defendants * * * collected in full from the First Security Deposit Corporation and thereby realized huge profits for themselves personally." This is a gross inaccuracy. The evidence shows to the contrary that the defendants did not personally profit.

At pages 25 and 26 of his brief appellee states that the defendants, at the time the reorganization committee obtained consents of the Railway Mutual investors to the reorganization, had procured "enough proxies from said investors to vest in said defendants the control of said company." For the first two years the common stock represented, which was only a small issue, the voting control. The law firm of Haight and Trippet were the

authors of the "plan, agreement and declaration of trust", the consent and proxy and Exhibit 131 (the initial communication to investors regarding the proposed reorganization). Whatever action was taken as to proxies was long before Mr. Edgerton's association with the First Security (Op. Br. 19). Mr. Edgerton was not an officer or a member of the Board of Directors of the First Security. He held no proxies and did not become a stockholder until 1939, when he acquired an inconsequential number of shares [R. 285-286].

In connection with the dissolution of the Investment Finance and the transfer of all of its assets to the First Security in August, 1940 appellee asserts at page 30 of his brief, without any supporting citation of the record, that "it is undisputed that many of the items of assets transferred by Investment Finance Company to First Security were of doubtful value." This statement is definitely disputed. No evidence was offered of the value of any of these items of assets nor was there any evidence of any appraisement of any of these items. Listed in the assets transferred was a small block of preferred stock of the First Security. Even as to this item there was no evidence of its actual value, but only evidence that preferred stock of First Security had been purchased at a discount.

At page 42 of his brief appellee reiterates in substance his previous erroneous statement that Investment Finance received one hundred cents on the dollar for First Security bonds from First Security, (*supra*, p. 18).

POINT I.

Amendment of Indictment by Deleting Reference to Type of Investments Proposed. (Assignment of Error XII.)

The trial Court's action was not a mere "withdrawal" from the jury of a portion of the charges, as suggested inferentially by appellee at p. 19. The Court struck out the portion of the indictment descriptive of the type of investments proposed.

"I have already told you that I would strike out a certain portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:

* * * theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California
* * *"

In excepting to the Court's ruling striking out these lines counsel for one defendant suggested that "the whole allegation" should be deleted, "and that it *should not be left amended.*"

The Court then stated that it was his view that the portion "could be deleted, and still the paragraph contains a *charge* proper in the indictment * * * If that couldn't have been, I would have stricken the whole paragraph." [Appendix App. Op. Br. pp. 4-5.]

Thus the Court's action modified the charge as to an element of one of the two misrepresentations charged,

i. e., the type of investments to be made. As this Court has pointed out "the very essence of the crime consists in the making of false promises." (*Barnard v. U. S.* (C. C. A. 9), 16 F. (2d) 451, 453.)

The trial court then proceeded to instruct the jury that proof of the falsity of the representation as modified would authorize a verdict of guilty (App. Op. Br. p. 64).

As this Court has further held a representation must be proved in its entirety. Proof of a portion only of a claimed representation constitutes a failure of proof (App. Op. Br. 62).

It is therefore clear that appellee is in error in asserting that the deletion "in no wise affected" the "charging part" of the indictment (pp. 17-18).

Appellee attempts to distinguish the cases relied upon by appellant by the assertion that the deletions, in those cases, went to "the very heart of the indictment" (p. 18). The fact is, however, that the deletions were of less substantive consequence or significance than the deletions made in the present case (App. Op. Br. pp. 58-60). While the amendment made by the trial court was in a material respect, the application of the rule does not depend upon the materiality of the amendment.

The cases cited by appellee have no application here. In *Salinger v. U. S.*, 272 U. S. 542, 548-9 the indictment charged "several relatively distinct plans for fleecing victims." What the Court withdrew from the jury was all of these plans but one. This was done at defendant's re-

quest. In *Dowdy v. U. S.*, 46 Fed. (2d) 417, 419, certain overt acts were withdrawn from the consideration of the jury. The case of *Ralston v. Cox*, 123 Fed. (2d) 196 was expressly based upon the ground of estoppel, in both the main and concurring opinions. Defendant had moved that the particular counts and overt acts be withdrawn from the jury as prejudicial to the defense. *Hartzell v. U. S.*, 72 Fed. (2d) 569, 586, involved a general instruction to the effect that "more details were alleged in the indictment than were necessary to prove."

These cases are far from holding that the Court may submit to the jury a modified charge. They merely indicate the propriety of withdrawing entire counts or overt acts, at defendant's request. An overt act does not limit, extend, or define the offense charged. Likewise a charge of one offense is not modified by the withdrawal of other charges. But the charge presented by the grand jury in the present case was modified by the trial court when the gist of that offense, *i. e.*, a false representation alleged was shorn of one of its elements, *i. e.*, the description of the type of investments to be made. This was a substantial and material modification, as it authorized a verdict of guilty upon proof of the making of a representation different from and falling short of the particular representation alleged.

Evidence was admitted that at the time the reorganization committee was soliciting Railway Mutual investors to exchange their securities for those of First Security that they stated in a letter to depositors (Ex. 132, dated

Dec. 10, 1931) that a portion of the assets of the Railway Mutual would be converted "into a mortgage corporation enjoying all of the advantages of the mortgage companies generally" [R. 332]. Evidence was offered that on July 19, 1933, First Security sent a letter in which it was stated "on the basis of today's reduced market value of real estate, loans offer more than an ample margin of security and at attractive rates. Recovery can be speeded only by placing the company in position to attract and accept funds for investment and resuming its normal function of loaning, thereby again placing it on a profit earning basis" [R. 348, 345]. These representations were not charged in the indictment. They do not support the charge that it was falsely represented that loans would only be made on securities or property theretofore approved as legal investments by the Superintendent of Banks, etc. The above evidence might support the modified allegation that they would loan "only upon securities or property." But this is quite different than the representations alleged in the indictment.

The cases are clear, however, that the application of the rule of *ex parte Bain*, 121 U. S. 1, is not dependent upon the materiality of the modification. In the *Bain* case the deletion consisted of six words referring to the comptroller of currency; in *Stewart v. U. S.* (C. C. A. 9), 12 Fed. (2d) 524, 525, the word "feloniously" was deleted. It was nevertheless held, as it must be held here, that the indictment as modified was "no longer the indictment of the grand jury who presented it."

POINT II.

Error in Instructing Jury That Portions of Indictment Were Stricken. (Assignment of Error XIII.)

See Point I, *supra*.

POINT III.

Insufficiency of Evidence. (Assignment of Error I.)

See Point V, *Infra*.

The argument in support of points III and IV (Op. Br. p. 65) is set forth at page 65 and succeeding pages of appellant's opening brief, and the response of the government thereto is set forth commencing at page 22.

We have challenged the sufficiency of the evidence in four particulars: (a) That there is no evidence to sustain the allegation that it was *falsely* represented that the First Security would loan money only upon security on properties approved as legal investments; that (b) there is no evidence to sustain the allegation that it was falsely represented or pretended that the First Security was organized for the purpose of, and actively engaged in, the liquidation of the assets received by it from the Railway Mutual; (c) that there is no evidence to sustain the allegation that the defendants did depress and caused to be depressed the market price of the securities of the First Security; and (d) that there is no evidence to sustain the allegation that defendants did convert and divert to their own use, benefit and profit, large sums of money and property of the First Security, under the pretense of loans.

Appellee does not categorically answer our arguments under these topical headings. In fact he utterly fails to make any answer to our contention that the evidence fails to disclose that the defendants falsely represented that the First Security was actively engaged in the liquidation of the assets received by it from the Railway Mutual. Obviously he could make no answer to this contention as the evidence discloses the contrary, *i. e.*, that the First Security was actively engaged in the liquidation of the assets received by it from the Railway Mutual (Op. Br. 70). He makes no answer to our contention that the evidence fails to show that the representation with reference to liquidation, even if assumed to be false, in any wise, resulted in any security holder being defrauded. Obviously he could make no answer inasmuch as the security holders received not less than the market price (Op. Br. 71).

In answer to our contention that there was no evidence to sustain the allegation that it was falsely represented the First Security loaned money only upon securities and properties approved as legal investments, we have seen that he relies on Exhibit 131 which contains no such representation and on the testimony of the witnesses Morse [R. 682] and Talmantes [R. 659], neither of whom testified that such a representation had ever been communicated to them either orally or in writing. (See *supra*, p. 5.)

Counsel's argument on the insufficiency of the evidence consists of a reiteration of what he has set forth in his statement of facts and embodies all of his errors and misstatements as to fact.

Appellee to our contention there was no evidence to sustain the allegation that the defendants did depress and cause to be depressed the market price of the securities of the First Security makes no answer to our argument. It is no answer to say that bonds were bought at a discount from face principal value. The fact that securities were bought at a discount from face value is no proof that the market price or values was in fact depressed. The appellee made no effort to offer any evidence as to market price or value of the securities of the First Security.

Our contention that there was no evidence to sustain the allegation that the defendants converted and diverted to their own use, benefit and profit large sums of money and property of the First Security under the pretense of loans is apparently attempted to be answered by the claim that since the defendants after August, 1937, stood in the technical position as holders of the majority of the stock of the Investment Finance were in the theoretical position to participate in the profits of the Investment Finance, if any (Appellee's Br. 12). The fact that they stood in such a theoretical position is no proof of the allegation that they did convert and divert to their own personal use large sums of money and property under the pretense of loans. Appellee makes no contention that in fact any monies or properties were converted and diverted to their own use under pretense of loans. Surely the isolated small real estate transaction of Mr. Edgerton back in 1934 and the likewise isolated small transaction of the R. F. D. in

1934 in connection with the liquidation of the Reed Brothers Mortuary loan is no proof of this allegation of the indictment.

Appellee has repeatedly asserted the evidence was "overwhelming" and "ample" as to Mr. Edgerton. We pose the query: Why were other defendants acquitted or not convicted as to whom the evidence disclosed played a major role in the affairs and transactions of both companies as compared to Mr. Edgerton? Obviously there can be but one answer and that is that extraneous and collateral matters prevented Mr. Edgerton from receiving a fair and impartial trial.

After referring to certain transactions as constituting a diversion or conversion of the assets of First Security (pp. 22-46) Appellee's brief concludes on this point with the heading

"It is not necessary that all the misrepresentations alleged in the indictment must be proven." (p. 46.)

For ought we know the jury reached a conclusion that the allegation of misrepresentation as amended by the trial court was the sole one finding support in the evidence. We cannot speculate as to whether the jury found the unamended allegation of misrepresentation had been proved as against the amended allegation of misrepresentation.

Williams v. North Carolina, 87 L. Ed. 189, 191.

But appellee has failed to refer to any evidence of *any* alleged false representation. Certainly evidence of con-

version, which appellee asserts, is established, is *not* evidence of a false representation. The *false representation* is the gist of the offense. (*Barnard v. U. S., supra.*) It is not supplied by evidence of conversion or damage.

The cases cited by appellee (p. 46) on the point of whether *all* the misrepresentations must be established are not contrary to the many cases cited by appellant holding that the proof *must fairly establish substantially the scheme and artifice pleaded* (App. Op. Br. 72-742).

Much less do the cases relied upon by appellee hold or indicate that mere proof of conversion or damage will supply the essential element of a false promise.

It is submitted that the decisions of this court and the other decisions referred to in appellant's opening brief as illustrative of the element of false representation, and of its integral character, are not to be disregarded for the mere reason, as appellee suggests, p. 47:

"in the case at bar the false representation was a part of and in furtherance of a scheme or artifice to defraud."

Not only must there be proof of false representation, in the sense of the decided cases, but the evidence must show the making of *the* particular representation alleged and the falsity thereof. Conviction is not sustained by proof of other different false representations (App. Op. Br. 72-74).

POINT IV.

Error in Denying Motions to Dismiss for Insufficient Evidence. (Assignments of Error II to XI.)

See Points III *Supra* and V *Infra*.

POINT V.

Error in Refusal to Charge Concerning Absence of Evidence of Market Price or That Market Price Had Been Depressed. (Assignment of Error XV.)

The allegation of the indictment that defendant "did depress and caused to be depressed the market price of said securities * * *," according to appellee's contention, pp. 49-51, did not raise any material issue as to market value of the securities. It is asserted that "any proof as to market value was not material," the argument being that the "transactions were part of a scheme to defraud" and the government is only required to prove a scheme to defraud and the use of the mails pursuant thereto (pp. 50-51). It is finally asserted that the indictment need only show with reasonable certainty the existence and character of the scheme (p. 51).

It is submitted that the entire argument of appellee is wholly beside the point.

If as appellant contends the court refused a proper instruction as to proof of market price, and instead gave an erroneous one which authorized the jury to convict on a showing of mismanagement as distinguished from the charge of intentional depression of the market price, then the error is not cured in the slightest by the fact that

there may have been proof of a scheme to defraud or by the fact that the indictment might have been framed in the first instance in less specific form as to depressing the market price.

The fact remains that an element of the scheme as *alleged* was the depression of the market price.

During the course of the trial the court referred to this portion of the charge as "an important allegation" and referred to depressing the market price as "a necessary phase of proof" and as the first of two elements which "have got to be proven" (App. Op. Br. 87).

The prosecution having rested without presenting any proof of depressing the market price, the trial court completely reversed his position by instructing the jury in such a manner as to obviate this defect of proof, and to authorize a verdict of conviction upon a conjecture that a higher price would have been obtainable except for defendants' "activities." The court thus authorized the jury to convict upon an issue extending far beyond the specific charge of the indictment that defendants had depressed the market price.

It is submitted that appellee's brief is in reality a confession of the validity of appellant's contentions on this point (App. Op. Br. 83-87).

POINT VI.

Error in Admitting the Twombly Statement, Wholly Exculpatory as to Defendant Twombly and Inculpatory as to This Appellant. (Assignment of Error XXXIX.)

The Twombly statement, as we have shown, was a laborious collation of every transaction or happening, occurring over a period of several years, which the declarant could paint or characterize in such a manner as to reflect unfavorably upon appellant Edgerton (App. Op. Br. 90-96).

The date of preparation of the statement was not shown. It was first communicated by defendant Twombly when he delivered it to a post office inspector more than a year after his "disassociation" from defendants (App. Op. Br. 97).

Inexplicably the trial court instructed the jury that the "statement was made", as a presumption of law, "upon the last day that he was connected with the companies, to wit December 21, 1938" (App. Op. Br. 97). There was no further identification of date or surrounding circumstances.

It is important to note the purpose for which this particular harangue was admitted. It was *not* admitted for the purposes stated in appellee's brief, "(1) As an admission against interest on the part of the defendant Twombly; and (2) To show his joining the scheme or enterprise and as to him the existence of a scheme or enterprise."

The foregoing is evidently based upon the *purpose as stated by counsel*, but this was *not the purpose* for which the trial judge admitted the harangue or for which he submitted it to the jury.

(It may be noted at this point that the document was not in fact an “admission” against interest and likewise it was not substantive evidence to “show his joining the scheme” or the “existence of the scheme.”)

THE PURPOSES FOR WHICH THE TWOMBLY STATEMENT WAS ADMITTED.

The trial court instructed the jury in his only statement to them before the document was read to them.

“We describe this as a narration, as a narrative of what has happened in the past. Now that document isn’t evidence which you may properly consider in any way, shape, or manner, *as against any defendant in this court room*, including the Defendant Twombly, *except to show his intent in connection with the crimes charged*. It is expressly limited to that” [Appendix App. Br. 20].

In his formal instructions to the jury the court instructed that the document was “for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved” [R. 1031].

It is clear therefore that the court did not allow the evidence as an admission against Defendant Twombly or as substantive evidence against him—but rather as evidence

of *intent* only, and not the intent of defendant Twombly only, but the *intent of all defendants*.

The Court's error in this regard was accentuated by an instruction which required the jury to determine whether or not the defendant Twombly believed the said statements were true or false when made, and also, to decide whether or not the information thus received if it was in truth and in fact received prior to his disassociating himself from said defendants and said companies (the Court had already instructed the jury that such was a presumption of law), and thus construed by said defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies.

The Court thus inexplicably placed in issue before the jury, the truth or falsity of these entirely collateral charges and gave them substantive force in themselves as matters to be considered by the jury as actuating Twombly in disassociating himself from defendants.

With this emphasis upon the Twombly statement it is evident that the ordinary jury would find it impossible, even if properly instructed, to eradicate from their minds the impression necessarily conveyed by the Twombly charges.

Appellee has cited no case which furnishes any precedent whatsoever for the action taken by the trial court.

In the case of *Latses v. U. S.*, 45 F. (2d) (C. C. A. 10), P. 9, there was no showing that the evidence was prejudicial to the co-defendant.

In *Glasser v. United States*, 315 U. S. 60, 86 L. Ed., 62 S. Ct. 629, the evidence made no reference whatever to appellant.

In *Cochran v. U. S.*, 41 F. (2d) 1932, P. 206, the statement was either read to or handed to co-defendant.

In *Kuhn v. United States*, 24 F. (2d) 910, 913 (C. C. A. 9th), the evidence consisted merely of notations of the amount of interests of defendants. The court observed that the evidence was a "delicate subject to be handled with care."

In *Kasuba v. U. S.* 3 F. (2d) 271 (C. C. A. 7th), the admission was made by the appellant himself.

In *Oras v. U. S.*, 67 F. (2d) 463, 465 (C. C. A. 9th), one defendant had stated at the time of a raid that he had given his co-defendant \$700 to finance a distillery and was to be repaid by alcohol produced by the distillery.

In *Sabbatina v. U. S.*, 298 Fed. 409, 412 (C. C. A. 2), there is nothing to show any matters whatever affecting any co-defendant.

In *Fedder v. U. S.*, 257 Fed. 694, 696 (C. C. A. 9th), the judgment was reversed for failure to charge that the evidence was not admissible against a co-conspirator.

In *Mitchell v. U. S.*, 23 F. (2d) 260, 262 (C. C. A. 9th), there is nothing in the opinion to indicate the nature of the evidence.

In *Gwinn v. U. S.*, 294, Fed. 878, 879, 880 (C. C. A. 5th), the testimony was that one defendant after arrest asked the witness to tell appellant he had received certain checks from a third party.

No Other Cases Are Cited by Appellee.

In none of the cases cited is the factual situation at all similar to that here presented.

Appellee has wholly failed to answer appellant's contention that the accusatory statement was not admissible even against the declarant himself.

We have shown that as evidence of intent (which was the limited purpose for which it was admitted, except as later broadened by the Court) it was inadmissible because *not a contemporary statement of a present state of mind under inquiry* (App. Op. Br. 98-100, 106). *This point is entirely ignored by appellee.*

Appellee has also failed to answer appellant's contention that if any portions of the 17 page accusatory statement are admissible—and there are none—then only such portions should have been introduced and not the entire series of charges (App. Op. Br. 104).

We have collected in the opening brief a large number of decisions of the Supreme Court, of this Circuit and other circuits, as well as the California courts condemning the admission of accusatory statements and holding that under circumstances much less vicious than those existing here, it cannot be assumed that any purported limitation of the evidence will assure a fair trial (pp. 100-112).

There appears to be no instance, in the decisions, in which a jury has ever been asked to view with a degree of detached discrimination accusatory charges of such multitude or enormity.

Appellee's *sole* justification for the use of the accusatory statement is the assertion that it proves "knowledge" on the part of Twombly of the events related (p. 54).

Putting aside the determinative factor that it was *not* offered to show "knowledge" and was *not* received to show "knowledge," but rather "intent," the crucial fact remains that it *does not show knowledge at any time prior to the delivery of the statement*, which was more than 1½ years after December 21, 1938, which according to the court's instructions was the date of his disassociation from defendants (App. Op. Br. 88, 101).

The cases are clear beyond controversy that a statement is admissible only to show contemporaneously existing knowledge. It cannot point "backwards to the past." It cannot show a pre-existing knowledge or state of mind (App. Op. Br. 98-100). The "knowledge" of defendant Twombly *as of the date of the statement* 1½ years after his admitted disassociation from defendants was utterly immaterial.

It follows that there was not the slightest justification for submitting to the jury's consideration the multitudinous charges of the unsworn unsubstantiated accusatory statement.

That the trial court proceeded upon a principle directly contrary to that of the decisions (App. Op. Br. 96-112) of the Supreme Court by which courts are enjoined to avoid risk of confusion and refrain from exacting a duty upon the jurors of exercising a special degree of discrimination, is evidenced by the trial court's remarks with reference to the accusatory statement.

"The Court: * * * Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall? * * *" [R. 785].

POINT VII.

Error in Denying the Motion for Severance Made at the Time of the Offer of the Twombly Statement.
(Assignment of Error XXX.)

In our opening brief we referred to the cases of *Hale v. U. S.*, 25 Fed. (2d) 430, page 114; *People v. Buckminster*, 274 Ill. 435, 113 N. E. 713, page 115; *People v. Sweetin*, 325 Ill. 245, 156 N. E. 354, page 116, and *Randazzo v. United States*, 300 Fed. 794, page 117 (as holding that a severance should be granted where a statement or confession of one defendant refers to a co-defendant in such a manner as to "leave upon the minds of the jurors a lasting impression to his prejudice" (App. Op. Br. 114-117). *None of these cases are referred to in appellee's brief.*

Appellee makes reference to the case of *Soblouski v. United States*, 271 Fed. 294, 295 (C. C. A. 2nd), as holding that the fact the moving defendant "did not like the atmosphere created by the presence of a third defendant before the jury," is not a ground for severance. But the issue here is not one of "atmosphere." It is the question of whether the admission of the Twombly statement "in its entirety would be necessarily prejudicial" to appellant. (*Hale v. U. S.* (C. C. A. 8), 25 Fed. (2d) 430, 438-9.)

The case of *Rarrup v. U. S.*, 23 Fed. (2d) 547, 548, also referred to by appellee specifically holds that no possibility of prejudice was shown.

The remaining cases cited by appellee (p. 58) all emphasize the same point.

The trial court is called upon, in ruling upon such a motion, to exercise a legal discretion, and not an arbitrary, "let the chips fall where they may"—attitude.

As stated in *Bailey v. Taaffe*, 29 Cal. 422, 424,

"The discretion intended—however, is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to defeat or impede the ends of substantial justice."

The answer to the question of whether such an impartial legal discretion was exercised appears from a comparison of the governing principle as enunciated by the Supreme Court with the trial court's statement in denying the motion.

The Supreme Court has said:

"When the risk of confusion is so great as to upset the balance of advantage the evidence goes out."

The trial court stated:

"Is it not proper to introduce the whole document regardless of where the chips may fall?" (App. Op. Br. 113-114).

POINT VIII.

Error in Denying the Motion for Mistrial. (Assignment of Error XXXI.)

See Points VI and VII *Supra*.

POINT IX.

Error in Admitting the Campbell Report. (Assignment of Error XXV.)

Appellee concedes the prejudicial character of the Campbell report, but asserts that its admission was proper to show "notice;" to show "knowledge and intent" (p. 60). The record is clear however that the report was offered and received *only upon the issue of intent* [App. to Op. Br. 41].

But the statement could only show the state of mind of the declarant *Campbell* and not that of any defendant. Only upon proof of knowledge of the report by Appellant Edgerton together with action taken by him in connection with such report, could the statement have any significance and then only as to the action taken. There was no such proof. Campbell was available and could have been produced (and subjected to cross-examination) to show what, if anything, Appellant Edgerton said or did concerning Exhibit 46 (App. Op. Br. 124).

The ruling of the trial court is directly contrary to the decision of this court in *St. Claire v. U. S.* (C. C. A. 9), 23 Fed. (2d) 76-78 (App. Op. Br. 123) which *appellee does not attempt to distinguish, and to which no reference is made.*

POINT X.

Misconduct of Plaintiff's Counsel in Stating to the Jury That the Campbell Report Was True. (Assignment of Error XXVI.)

Appellee suggests (p. 64) that the claim of misconduct in this regard is not open, for the reason that there was no request for an admonition to the jury to disregard the plaintiff's argument.

Appellee cites this court's decision in *Diggs v. U. S.*, 220 Fed. 545, 556. That case enunciates the general rule prevailing in California and is expressly based upon the California decisions. These decisions, however, establish an exception to the general rule which withdraws the present case from the operation of the rule relied upon by appellee.

In *People v. Crosby*, 17 Cal. App. 518, 526, the court, in passing upon a situation identical with that here presented, said:

"Hence, it appears that the attention of the court was, in express terms, directed to the matter and the same assigned and designated as misconduct. True, he did not ask the court to admonish the jury, but it was not necessary to do so. The statement of the court in sustaining the objection upon the sole ground that it was leading, by implication at least, was a ruling that it was not objectionable upon other grounds, and was not misconduct. It appears, therefore, that the misconduct of the district attorney was accompanied by error of the trial court, resulting in the sustaining of the district attorney in the act constituting the misconduct."

Here the objectionable character of counsel's argument was specifically called to the court's attention. The court, however, ruled

"I see no impropriety in that" [Appendix of Op. Br. 45].

Finally the conduct of counsel was expressly assigned as misconduct [Appendix Op. Br. 48-49].

Appellee suggests (p. 66) that no damage resulted from counsel's commendation of the report. The assertion is inexplicable. The charges of the Campbell report were of the most serious character. They amounted in fact to a second indictment (App. Op. Br. 119-124).

The limitations referred to (pp. 66-67) as having been placed by the court upon plaintiff's counsel with reference to the issue of intent referred only to proposed reading from the report [Appendix Op. Br. 47].

But plaintiff's counsel was not content merely to read from the report. He then proceeded to argue that the report had been established as true [Appendix Op. Br. 48]. There can be no other conclusion drawn from the state of the record, except that of a conscious deliberate and successful effort on the part of plaintiff's counsel to prejudice the jury by the improper use of improper evidence.

At page 71 appellee refers to the fact that plaintiff's counsel at one point [Appendix 47] withdrew a portion of his comment. The purported withdrawal only accentuates the deliberateness of the misconduct, for counsel on the very next page [p. 48] repeated with more elaboration and emphasis the very argument he had purported to withdraw.

At page 68 appellee argues that misconduct is not prejudicial where the evidence is overwhelming. But we have seen that the prosecution's evidence was of the flimsiest sort. Point III, *supra*. In refusing to convict the defendants who were not implicated in the Twombly statement, the jury must have regarded it as such.

Appellee argues [p. 69] that the mere fact that counsel for one of the defendants had stated in his argument to the jury:

“I have shown you there is no evidence in this case in the first place to support the charges that are made,”

authorized plaintiffs' counsel to proceed affirmatively to argue the truth of these broad charges, which should never have been placed before the jury in the first place, and the admission of which was expressly limited both by offer and ruling to the issue of *intent*, so that the issue of their truth was not before the jury; that counsel could proceed to disregard the limitations of his own offer and of the court's ruling, and to argue anew the immaterial issue of the truth or falsity of the statement, just as though the matter were properly before the jury.

It was not a matter of going outside the record as in the cases cited at pp. 70-71. Both counsel remained within the record, but plaintiff's counsel was permitted to present to the jury as established facts, a series of unsworn charges which under no conceivable circumstances could be proper for the consideration of the jury as issuable facts. (App. Op. Br. 127-8).

Furthermore, it will be noted that in all the cases cited the court took appropriate measures to assure that no prejudice would result.

POINT XI.

Misconduct of the Trial Judge in Insisting Upon Defendants Stipulating to Certain Facts. (Assignment of Error XXVII.)

Appellee suggests tentatively that there were no objections or exceptions to the remarks of the trial court. The case of *Kettenback v. U. S.* (p. 72) determined that no improper remarks were made. The case of *Marin v. U. S.* (p. 72) had reference only to the correctness of formal instructions.

This court has recently held that the rule requiring such an exception does not apply in all cases to misconduct on the part of the judge. Counsel for defendant was not required to provoke a further demonstration of the court's hostility which would inevitably react unfavorably upon his clients, in the minds of the jury. (*Williams v. U. S.* (C. C. A. 9), 93 Fed. (2d) 686, 690-691.)

The instances of the utmost impatience exhibited toward defendant's counsel were so numerous, and so unwarranted that they could not have been inadvertent. To require objection under the circumstances would be to require what at best would be but an idle act, and might well result in a further outburst of impatience and censure (App. Op. Br. 129-136).

The cases cited in the opening brief establish that "such judicial intimidation, derogatory remarks, ridicule and harassment on the part of a judge have no place in a court of justice" (App. Op. Br. 138-140).

These cases are entirely ignored in appellee's brief. In the cases cited by appellee the remarks of the court were so mild in comparison to those under review here that they fully confirm rather than limit the rule announced in the cases relied upon by appellant.

POINT XII.

Other Instances of the Court's Misconduct. (Assignment of Error XXVIII.)

All remarks under review were a continuation of the court's censure of the defendant's counsel. With reference to appellee's point that no objections were noted to the court's voluntary prejudicial remarks, there can be no pretense that the censure of the court would have been withdrawn, or even that a withdrawal if made could have erased the impression necessarily conveyed to the jury.

Counsel did present their view of the matters for which they were censured, both tactfully and without provocation. The court's ruling in each instance was adverse and an exception noted. Counsel were not required to further demonstrate to the jury the court's adverse attitude. (*Williams v. U. S.*, 93 Fed. (2d) 685, 690, 691.)

It is submitted that a review of the trial court's remarks (App. Op. Br. 141-146) bearing in mind the numerous strictures of the court discussed under Point XI shows that the trial court failed to exhibit "that attitude of disinterestedness which is the foundation of a fair and impartial trial."

POINT XIII.

Statements by the Court and Plaintiff's Counsel Concerning Matters Outside the Record. (Assignment of Error XX.)

Appellee's entire argument on this point is based upon the erroneous assumption that the witness Fred O. Morse testified that he had "received" the plan (pp. 88-89, 91). It is then concluded that he must have read it. This is an obvious non-sequitur.

But appellee has confused Exhibit 131 with Exhibit 9. It was Exhibit 9 which contained the "plan." Exhibit 131 did not contain the representation as to approved investments. The purported quotation at pages 87 and 88 is not a quotation from Exhibit 131. It appears only in Exhibit 9. Therefore there was no evidence and there can be no inference that the witness read the plan, from the mere fact that he received Exhibit 131 (App. Op. Br. 150-151). Also see *supra*, page 3.

POINT XIV.

Error in Refusing Cross-Examination as to Market Price of Securities. (Assignments of Error XXIII and XXIV.)

Appellee asserts that no exceptions were taken to the refusal of the court to permit cross-examination on the issue of market price. The appellee is in error. The objections and exceptions appear at Appendix Op. Br. pages 81, 82, 83, 86.

That the cross-examination was upon a material matter which very well might have elicited testimony favorable to the defense appears from the evidence that investigations were in fact made as to the market price and that as a result of such investigations the witnesses accepted defendant's offer (App. Op. Br. 153-156).

Appellee's final argument is that the market price was immaterial, but this ignores one of the elements of the scheme charged, *i. e.*, depression of the market price; it ignores also the element of false representation with reference to the market price which appellee asserts in other portions of its brief.

POINT XV.

Evidence of Collateral Transactions. (Assignment of Error XXXIV and XXXV.)

Appellee asserts that the evidence of collateral transactions was admissible to show intent (pp. 102-104).

It is only necessary to point out that the evidence was neither offered nor received for this purpose, but only to show a breach of the asserted promise that investments would be made only in *approved* securities.

This allegation, however, was subsequently modified by striking from the indictment the words “* * * theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California” and the same was withdrawn from the consideration of the jury (App. Op. Br. 158-159).

It is clear therefore that the motions to strike this evidence should have been granted.

Conclusion.

For each and all of the reasons set forth in our opening brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

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